(1)

91-2066

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF CHANUTE, KANSAS, *et al.*,
Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

Petiton for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an interstate pipeline company, owning the sole pipeline facility serving a market area, which refuses to transport natural gas to its customers in that market for their local distribution systems purchased by them from independent producers, in order to thereby require those customers to purchase the pipeline's own gas, violates the essential facilities doctrine under § 2 of the Sherman Act?

2. Whether the tying of transportation and sales of its own gas by an interstate pipeline company having monopoly power, requiring the pipeline's customers to enter contractual arrangements for their necessary gas supplies solely with the pipeline and forego purchases from third-party independent producers, constituted a violation of § 1 of the Sherman Act?

3. Whether the court of appeals erred in affirming summary judgment of Petitioners' monopolization claims under § 2 of the Sherman Act by holding that where direct exclusion of customers' access to alternate gas supplies enhances a pipeline's profits, it constitutes à "legitimate business justification" and strips its customers of antitrust standing, thereby immunizing the pipeline under the antitrust laws?

LIST OF PARTIES

Petitioners:

City of Chanute, Kansas;
City of Auburn, Kansas;
City of Garnett, Kansas;
City of Humboldt, Kansas;
City of Iola, Kansas;
City of Neodesha, Kansas;
City of Osage City, Kansas; and
City of Cleveland, Oklahoma

Respondent:

Williams Natural Gas Company

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

The City of Chanute, Kansas, *et al.* ("Cities")[1] hereby petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-34a) is reported at 955 F.2d 641 (10th Cir. 1992). The two opinions of the district court granting summary judgment

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[1] City of Chanute, Kansas; City of Auburn, Kansas; City of Garnett, Kansas; City of Humboldt, Kansas; City of Iola, Kansas; City of Neodesha, Kansas; City of Osage City, Kansas; and City of Cleveland, Oklahoma.

against Cities' claims for damages are reported at 743 F. Supp. 1437 (D. Kan. 1990) (App. 35a-85a) and 1990-1 Trade Cas. (CCH) ¶ 68,967 (D. Kan. 1990) (App. 86a-123a). The district court's memorandum and order granting Cities' motion for a preliminary injunction is reported at 678 F. Supp. 1517 (D. Kan. 1988) (App. 124a-160a).

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. On March 27, 1992, the court of appeals denied Cities' request for rehearing and suggestion for rehearing *en banc*, making a petition for writ of certiorari due on or before June 25, 1992. App. 161a-162a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, declares unlawful "[e]very contract, combination. . ., or conspiracy, in restraint of trade or commerce among the several States. . ."

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . ."

Section 4 of the Clayton Act, 15 U.S.C. § 15, declares that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States. . ."

STATEMENT

In this case, the court of appeals has issued a sweeping decision immunizing the nation's pipeline industry from

liability under the Sherman Act for refusals to transport natural gas purchased by local distribution systems from independent third parties. The court held that as long as a pipeline offers to sell and transport its own gas, albeit at a substantially higher price, and without competition, there can be no violation of the essential facilities doctrine under § 2 of the Sherman Act. The court has held that there can be no liability under § 1 of the Sherman Act for a tying arrangement wherein a pipeline's agreement to transport gas is conditioned on the purchase of gas owned or offered solely by the pipeline, because these arrangements with the Cities allegedly do not constitute activities by two or more parties. Finally, the court improperly affirmed a summary judgment based on a holding that the pipeline's action constituted a valid "business justification" since it was designed to exclude competition in order to enhance the pipeline's profits and that Cities lacked standing and antitrust injury because their purchases were made pursuant to contracts or agreements imposed by the pipeline. All three of these rulings conflict with prior decisions of this Court and other circuits, and present important questions in the administration of the federal antitrust laws and their application to a major industry supplying approximately thirty percent (30%) of the nation's energy.

To place these rulings in their proper context, it is necessary to explain in some detail the background of this litigation.

Petitioners City of Chanute, Kansas, *et al.* ("Cities")[2] are each municipalities with their own natural gas distribution systems. The Cities purchase natural gas at wholesale and then resell it to residential, commercial and

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[2] City of Chanute, Kansas; City of Auburn, Kansas; City of Garnett, Kansas; City of Humboldt, Kansas; City of Iola, Kansas; City of Neodesha, Kansas; City of Osage City, Kansas; and City of Cleveland, Oklahoma.

industrial customers within the Cities and surrounding areas.

Respondent Williams Natural Gas Company ("WNG") is in the business of interstate sales and transportation of natural gas and as such is regulated by the Federal Energy Regulatory Commission ("FERC" or "Commission"). The case involves, but is not constrained by, the relationship between the antitrust laws and a federally regulated industry. WNG's pipeline system interconnects with gas producing fields in various states, and the gas is transported to users in Kansas, Oklahoma, Missouri and Nebraska. WNG is also interconnected with various other regulated natural gas pipelines through which gas may be sold, purchased and transported on WNG's system.

Gas may be transported as WNG's own "sales" gas purchased by the pipeline itself, or gas may be transported as owned by other entities. As such, there is both actual and potential direct competition for the sale of gas between WNG and gas producers themselves, or shipping or marketing brokers that have arranged gas purchase contracts between producers and local distribution companies ("LDC's") or ultimate users, and competition for the purchase of gas between WNG and its transportation customers (LDC's and industrial end users). The court also confirmed that the evidence showed the Cities competed with WNG at the retail level for new users and large commercial and industrial customers. *City of Chanute, et al. v. William Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir. 1992), App. 6a.

WNG's pipeline is the only interstate pipeline interconnected with the Cities. The court found that "the undisputed facts show Williams operated the only natural gas pipeline in the area of the Cities" and "[e]conomically, it was not feasible for the Cities to duplicate the pipeline." *Chanute*, 955 F.2d at 647, App. 6a. In industry parlance, the Cities are "captive customers" of WNG. A pipeline's

captive customers are defined generally as customers who do not have alternate fuel sources to which they may turn and are therefore dependent upon the pipeline for the purchase of gas and gas transportation.[3] As a result, the court below found sufficient evidence for WNG to be considered a monopolist with monopoly power over the transportation and sale of natural gas to the Cities. *Chanute*, 955 F.2d at 648, 654, App. 7a, 21a. In order to compete with WNG and others for the purchase or sale of natural gas (or both), the Cities require access to WNG's interstate gas pipeline.

On October 9, 1985, the FERC issued Order No. 436, 50 Fed. Reg. 42,408 (1985). *See Assoc. Gas Dist. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom. Interstate Nat. Gas Assoc. of America v. FERC*, 485 U.S. 1006 (1988). The rulemaking in Order No. 436 allowed, but did not mandate, "open access" transportation on interstate pipelines in which pipelines' sales gas (called "merchant gas") competed directly and openly with gas sales and purchases by third parties. The Order's overall purpose was to separate the pipelines' transportation and merchant roles in order to eliminate market distortions in the price of gas caused by pipelines' refusal to transport third party gas. *Id.*, 824 F.2d at 994. The goal was to provide the consumer the benefit of a competitive wellhead gas market through nondiscriminatory "open access" transportation. Participation by a pipeline in FERC's Order No. 436 open access restructuring program is strictly voluntary. Order No. 436 simply requires that if a pipeline transports any gas under § 7 of the Natural Gas Act, 15 U.S.C. § 717f or under § 311 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3371, it must do so on a nondiscriminatory basis. *Assoc. Gas Dist.*, 824 F.2d at 997-1003.

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[3] *Assoc. Gas Dist. v. FERC*, 824 F.2d 981, 995 (D.C. Cir. 1987), *cert. denied sub nom., Interstate Nat. Gas Assoc. of America v. FERC*, 485 U.S. 1006 (1988); *See Maryland People's Counsel v. FERC*, 761 F.2d 768, 770 (D.C. Cir. 1985).

Prompted by Order No. 436, WNG opened its pipeline on an interim basis to nondiscriminatory open-access transportation in December, 1986. All of the Cities then entered into arrangements with outside gas suppliers for the purchase of long-term firm supplies of gas. At that time two of the Cities had no existing contracts for the purchase of gas from WNG, and others had contracts which terminated on thirty days' notice, or expired at subsequent dates. To the extent that any existing contracts were in force with it, WNG waived their applicability after opening its lines until it put a permanent open access plan into effect.

After opening its pipeline, WNG sought to negotiate a permanent plan with all of its customers which would, *inter alia*, restrict the amount of outside gas each of them could purchase from suppliers other than WNG. Under these new proposed arrangements, each of the Cities would be required to enter into "new five-year contracts" with WNG and "to pay demand charges year-round even if they purchased no gas from Williams." *Chanute*, 955 F.2d at 647-48, App. 6a. When the Cities and other WNG customers refused to agree to these arrangements, WNG closed down the pipeline on August 1, 1987, and took the position that it would not reopen the lines until the parties agreed to its conditions.[4]

When WNG "closed" its pipeline to open access on August 1, 1987, it forced its sales customers, including the Cities, to purchase WNG gas if customers wanted transportation on WNG's system. By closing its pipeline, WNG obtained leverage over its customers for negotiating a new Order No. 436 plan—leverage that resulted in concessions

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[4] WNG officers testified that the old sales contracts were onerous and should be replaced, and that WNG had closed its pipeline to get bargaining power over its customers to get them to agree to new contracts sought by WNG. Doc. 85 at 877, 1005-07; Doc. 93 at 1225; Doc. 258, Tab 2 at 3.

from some of its customers allowing restrictions on the outside purchases of gas.

During the closed period, other gas was potentially available to some customers on WNG's system. Under Order No. 451, issued by the FERC on June 6, 1986, 51 Fed. Reg. 22,168 (1986), certain gas on WNG's system became available by virtue of FERC-implemented procedures for "renegotiation" of old, pre-NGPA gas prices. 18 C.F.R. § 270.201 *et seq.* (1987). *See Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Companies*, 498 U.S. ___ , 111 S.Ct. 615, 112 L.Ed.2d 636 (1991). The practical effect of these procedures was to "release" volumes of gas which had previously been tied to WNG's system under gas purchase contracts with WNG. Producers of the newly-released gas could then enter into contracts with third parties to sell the gas. Under Order No. 451 regulations, if the pipeline was closed under Order 436, then existing firm sales customers (such as some of the Cities) had a right of first refusal to buy the gas on the exact terms negotiated and have it transported on WNG's system. 18 C.F.R. § 270.201(g) (1987). By February, 1988, halfway through the closed period, the district court found that only three producers had offered Order 451 released gas to any WNG customers. *City of Chanute, et al. v. WNG*, 678 F.Supp. 1517, 1525 (D. Kan. 1988), App. 137a-138a. It then found that the offered gas constituted unacceptable alternatives to the Cities, even assuming the gas was practically available. *Id.* The district court and the court of appeals never found that this gas was suitable for the Cities' requirements, but did accept WNG's allegations that Order 451 gas was available to the Cities throughout the one-year period. *See e.g., Chanute*, 955 F.2d at 646, 649, App. 3a, 9a-10a.

The Cities filed this action on August 3, 1987, two days after WNG closed its pipeline. *City of Chanute v. WNG*, 678 F.Supp. 1517, 1519 (D. Kan. 1988), App. 125a. The Cities sought both injunctive relief and damages against

WNG under Section 2 of the Sherman Act and Section 16 of the Clayton Act and requested a jury trial.

The Cities thereafter filed a motion for preliminary injunction. *Id.* After discovery, the district court held hearings on the motion over nine days in October and November, 1987. After extensive briefing and oral argument, the court issued an order granting the motion for preliminary injunction on February 5, 1988. *Id.*

In its order, the court ruled: (1) that the Cities would suffer irreparable injury unless the injunction issued and rejected WNG's claim that the availability of Order 451 gas would not preclude irreparable harm because the evidence established the Cities had not received any offers of Order 451 gas comparable to the supply they could have obtained from Vesta Energy Co., a third-party supplier with which some Cities had signed long-term gas sales contracts and the other Cities were in the process of agreeing to long-term contracts when WNG closed its pipeline. *Id.*, at 1526, App. 140a-141a;

(2) that the threatened injury to Cities outweighed whatever damage the injunction may cause WNG, because the evidence established that WNG's claim of a take-or-pay exposure of $90 to $140 million was overstated because a preliminary injunction "would result only in minimal take-or-pay exposure to the defendant, while a denial of the requested injunction may result in the loss to the Cities of a steady, assured supply of natural gas at a price far more reasonable than that presently assessed by Williams," *Id.* at 1530, App. 149a;

(3) the preliminary injunction would not adversely affect the public interest because "substantially lower wholesale gas prices would benefit, rather than adversely affect, the customers of the plaintiff Cities," and "it cannot be in the public interest for anyone to be forced to accept WNG gas at its present rate, knowing full well that such rate is not

competitive in a real world setting," *Id.* at 1530, App. 150a; and

(4) that the Cities had demonstrated a likelihood of success on the merits by raising questions "so serious, substantial, difficult and doubtful" as to make them a fair ground for litigation, including a finding by the court that "451 gas has not been shown to be available to the Cities on a long-term, low-cost basis" and that "while WNG continues to provide the Cities with its own gas, it has denied the Cities an opportunity to use the facility to purchase third-party gas." *Id.*, 678 F.Supp. at 1530-33, App. 150a-156a.

Based on this, the district court ordered WNG to open its pipeline to the eight Cities for the transportation of third-party gas.[5]

Thereafter, on February 12, 1988, WNG appealed the preliminary injunction order for the eight Cities and requested a stay on the ground that it subjected the Company to a take-or-pay liability of $90 to $140 million. The Tenth Circuit Court of Appeals temporarily stayed the injunction but ordered expedited briefing and argument on the merits. On July 20, 1988, WNG accepted a certificate from FERC implementing its proposed permanent open access plan. *See Williams Natural Gas Co.*, 43 F.E.R.C. ¶ 61,227 at 61,599-600 (1988). That plan provided three service options for WNG's customers, none of which allowed immediate 100% open access transportation for existing gas sales customers. *Id.*, 61,586-88.

At the oral argument on July 22, 1988, the court of appeals recessed the matter to allow a conference between the parties, which resulted in a Stipulation of that date.

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[5] By the time the arrangements contemplated in the order would be effective, only three of the eight Cities had time left on their existing contracts with WNG, and all agreed to relinquish any existing contracts for gas supply from WNG as requested by it. *Id.* at 1520 n.1, App. 127a.

The Stipulation provided that (1) WNG would immediately transport 100% of the Cities' gas requirements from third-party producer sources; (2) WNG would not charge the Cities for any take-or-pay or other costs incurred by WNG other than the transportation rates approved by the FERC; (3) WNG and the Cities mutually agreed to terminate all sales contracts between them that had not already expired; and (4) based on these agreements, the preliminary injunction could be vacated as moot.

The Tenth Circuit, in an order issued July 28, 1988, approved the Stipulation and, pursuant thereto, vacated the preliminary injunction and the court's prior stay order. The Cities commenced purchasing 100% of their gas from outside producer sources, utilizing WNG's pipeline, effective August 5, 1988.

The case returned to the district court for trial on Cities' claims for damages under Section 4 of the Clayton Act. After some discovery, WNG filed in the fall of 1989 motions for partial summary judgment based on three grounds: (1) that the old full requirements contracts between WNG and Cities denied some of the Cities, whose contracts had not expired, antitrust standing under § 4 of the Clayton Act; (2) against Cities' Section 1 tying claims; and (3) against Cities' claims for extended five-year damages resulting from WNG's closing of the pipeline and cutting off Cities' long-range contracts with alternate, lower cost suppliers. At the oral argument on January 29, 1990, the court stayed further discovery between the parties.

On February 16, 1990, the district court granted WNG's first motion for summary judgment barring any antitrust claims by any Cities which had remaining old full requirements purchase contracts on the ground that such Cities had no standing under § 4 of the Clayton Act. *City of Chanute v. WNG*, 1990-1 Trade Cas. (CCH) ¶ 68,967 (D. Kan. 1990), App. 86a-123a. The district court also granted

WNG's motion for summary judgment that Cities' tying claims failed to allege anything more than unilateral conduct on the part of WNG and that Order 451 gas eliminated any "forcing" of the tied product. *Id.*, App. 117a-121a. The district court, however, denied WNG's third motion for summary judgment, ruling that the Cities had presented substantial evidence that WNG's closing of the pipeline had caused the Cities long-term damages cognizable under the antitrust laws.

Later, on March 19, 1990, WNG filed a new, fourth motion for summary judgment. The district court, on July 27, 1990, granted WNG's fourth motion for summary judgment based on, *inter alia*, findings that: (1) Cities did not have an essential facility claim because of the availability of Order 451 gas; (2) "regulatory turmoil" existed based on the FERC's long efforts to obtain open access by interstate pipelines which exempted WNG from complying with the federal antitrust laws; and (3) WNG's take-or-pay claims provided a legitimate business justification for the closing of its pipeline. *City of Chanute v. WNG*, 743 F.Supp. 1437 (D. Kan. 1990), App. 124a-160a.

On appeal, the Tenth Circuit court of appeals affirmed the district court. As to the Cities' claims under the essential facilities doctrine under § 2 of the Sherman Act, the court ruled as a matter of law that the refusal to transport third-party gas by WNG over its pipeline, thus requiring Cities to purchase WNG's high priced gas, did not deny Cities access to the pipeline. *Chanute*, 955 F.2d at 648-49, App. 7a-10a. With regard to Cities' Section 1 tying claims, the Tenth Circuit denied Cities' claims stating that there could be no violation of § 1 because there was no conspiracy to impose the ties contained in the contracts. *Chanute*, 955 F.2d at 650-51, App. 11a-13a.

The court of appeals upheld the summary judgment on Cities' general monopolization claim on the ground that this Court's decision in *Otter Tail Power Co. v. United*

States, 410 U.S. 366 (1973) did not apply where WNG proffered facts constituting *as a matter of law* legitimate business justifications for its monopolistic behavior and restrictions on competition. The court of appeals ruled that where the pipeline acted out of concern to increase its own profitability, it was immune from the antitrust laws. *Chanute*, 955 F.2d at 656, App. 23a-25a.

The court of appeals also found that as to those few Cities still having old full requirements contracts, WNG did not, as a matter of law, unreasonably restrain trade. *Chanute*, 955 F.2d at 651-53, App. 13a-15a. The Tenth Circuit found the contracts reasonable under the antitrust laws because "Cities offered no evidence that other gas suppliers would have sold to them but for the existence of their contracts with Williams." *Chanute*, 955 F.2d at 652, App. 15a, even though the court of appeals previously found that the Cities had entered into or were about to enter into other lower priced long-term contracts with third-party sellers when WNG closed its pipeline. The court ignored Cities' evidence obtained from WNG officers that the Company's reason for closing the line was to extract new, more restrictive contracts from its customers.

The Tenth Circuit also found that the Cities did not suffer any antitrust injury or have antitrust standing under § 4 of the Clayton Act because of the contracts. *Chanute*, 955 F.2d at 652-53, App. 16a-19a. The court found the contracts did not violate the antitrust laws, so therefore Cities did not show antitrust standing or antitrust injury. *Id.*

I. REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN RULING THAT A PIPELINE DOES NOT VIOLATE THE ESSENTIAL FACILITIES DOCTRINE WHEN IT CLOSES DOWN TRANSPORTATION OF ALL THIRD-PARTY SUPPLIES AND TRANSPORTS ONLY ITS OWN GAS UPON ONEROUS TERMS

The facts of the present case are clear, as recited by the court of appeals below:

> The cities presented evidence they competed with Williams at the retail level for new users and larger commercial and industrial users. The undisputed facts show Williams operated the only natural gas pipeline in the area of the Cities. Economically, it was not feasible for the Cities to physically duplicate the pipeline. *Chanute I*, 678 F.Supp. at 1533. Williams temporarily closed its pipeline to the transportation of third party gas even though the Cities either had long-term contracts or were negotiating long-term contracts for that third-party gas. *Id.* at 1521. Williams did not close the pipeline because of FERC regulations. Once Williams closed its pipeline . . . [the only option available to Cities was to enter] into new five-year contracts [with WNG] which required the Cities to pay demand charges year-round even if they purchased no gas from Williams. Williams' gas was more expensive than the other third party supplier's gas. The approved third party suppliers' gas that Williams continued to transport was short term and interruptible,[6] whereas the other third party suppliers provided long term, firm and much cheaper gas.[7] *Id.* at 1521.

> [6]Interruptible service does not guarantee that a producer will have sufficient supplies of natural gas to meet all consumers' demands.
>
> [7]Firm service does guarantee that consumers' demands will be met.

City of Chanute, et al. v. Williams Natural Gas, 955 F.2d 641, 647-48 (10th Cir. 1992), App. 6a. In spite of these facts, the court of appeals held that the essential facilities doctrine of § 2 of the Sherman Act did not apply as a matter of law where Williams, after closing the pipeline down to third-party supplies, did agree to transport and sell the Cities WNG's own gas in lieu thereof:

> . . . As a matter of law, we find Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines. This conclusion is strengthened by the fact Williams would also have transported less expensive gas from the approved third party suppliers.

Chanute, 955 F.2d at 649, App. 9a.

The court's decision conflicts with *Otter Tail Power Co. v. United States*, 410 US. 366 (1973); *MCI Communications v. Amer. Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985). *Certiorari* should be granted to resolve these conflicts.

The essential facilities doctrine is a four-part test to determine liability under § 2 of the Sherman Act. Liability is present where: (1) a monopolist is in control of an essential facility; (2) competitors of the monopolist cannot reasonably or practicably duplicate the facility; (3) the monopolist denies reasonable use of the facility to a competitor; and (4) it was feasible to provide reasonable use. *Chanute*, 955 F.2d at 647, App. 5a-6a; *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985); *MCI*, 708 F.2d

at 1132-33. The court found that items 1 and 4 were met, but ruled that Cities could reasonably duplicate the facility and that WNG had not unreasonably denied access. The reason was that WNG sold gas to Cities at a price regulated by FERC and therefore "[a]s a matter of law, we find Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines." *Chanute*, 955 F.2d at 649, App. 9a.

In *Otter Tail*, a leading essential facilities case, this Court held that where a utility owned essential transmission lines and refused to provide access by municipal utilities to those lines to obtain an outside source of electricity from a third-party entity, § 2 of the Sherman Act was violated. *Otter Tail*, 410 U.S. at 371, 375, 377-78. This offense of a refusal to wheel was affirmed separately from the offense of refusing to sell wholesale power to the municipals.

The court in *Otter Tail* also held that insofar as the wheeling was concerned, the Federal Power Act granted the Commission no power to order it, so that § 2 of the Sherman Act was not affected or superseded by it. This applies equally to the provisions of the companion Natural Gas Act, which has been construed as giving FERC no authority to order regulated pipelines to transmit gas. *Associated Gas Dist. v. FERC*, 824 F.2d 981, 996 (D.C. Cir. 1987). In *Otter Tail*, the Commission had authority to set just and reasonable rates for wholesale sales of electricity, but this was legally irrelevant to the antitrust issue of *Otter Tail*'s refusal to wheel outside supplies of power. Accordingly, the reliance by the Tenth Circuit below on FERC regulation of WNG's wholesale gas prices was not a valid legal basis to grant WNG antitrust immunity under the essential facilities doctrine to authorize a refusal to transmit outside supplies of gas. The Tenth Circuit's decision thus seriously conflicts with *Otter Tail*.

In *MCI*, 708 F.2d at 1132-33, the Seventh Circuit similarly ruled that the fact that AT&T offered its long-distance service at regulated prices, was not a basis for permitting AT&T to deny access to its essential telephone facilities sought by MCI for a competitive long-distance service.

While Cities competed with WNG to sell gas at retail, and with WNG to buy gas at wholesale, the competitors that were foreclosed from entering the entire wholesale gas sales market were gas producers and marketers that were attempting to sell gas at wholesale to Cities (and other LDC's). WNG's offer to sell gas to Cities at FERC-approved prices does nothing to mitigate the exclusion from the market of other gas sellers.[6] This is particularly true where, as here, the monopolist's price (and the price of Order 451 gas) was 25% to 40% above the market price, *i.e.*, the price that was charged when competitors were allowed access to the market.

Another way to explain this is to note that the court below confused the market with the essential facility. The market was for wholesale gas. The essential facility was the pipeline used to transport the gas. Providing gas at a regulated price, or even providing the slightly less expensive Order 451 gas,[7] was not a reasonable substitute for providing access to the pipeline so Cities (and other LDC's) could purchase gas at market prices. WNG's offer of its own gas, when its customers wanted access to the pipeline, was equivalent to Otter Tail Power Company's offer to sell its own electricity in the towns, at regulated prices, where the towns wanted access to Otter Tail's

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[6] As customers in this market, Cities had standing to sue for their injuries. *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

[7] Order 451 gas was not practically available to Cities because it was only offered, on a "take it or leave it" basis, in packages too large for Cities to accept.

transmission lines to enable them to purchase electricity from third parties.[8] Just like the towns in *Otter Tail*, Cities (and other LDC's) wanted to avoid purchasing energy from their monopolist supplier. Reasonable access to the essential transmission facility was not provided when the supplier simply sold its own product to its complaining customers and shut its potential competitors out of the market for such sales.

Finally, the court's ruling below that the Cities did not suffer any "severe hardship" by the denial of access conflicts with this Court's holding in *Aspen Skiing Co.* affirming that a condition imposed by an owner, having monopoly power over facilities, that offered 12.5% of gross revenues was deemed unreasonable (and hence a "severe handicap") when the plaintiff wanted to continue receiving 17%. *Aspen Skiing*, 472 U.S. at 590-92, 608-09. As found by the district court below, the exclusion of the Cities by WNG from the essential facility caused them to lose favorable contracts which subjected the Cities to the loss of millions of dollars in sales and profits over a five-year period.

The Tenth Circuit's erroneous rulings on the ability of customers in a market to sue when competition in that market is suppressed, the duty of monopolists to allow access to their essential facilities, and the difference between an essential facility and a market that uses that facility are in conflict with decisions of this Court and other courts of appeal. This Court should grant *certiorari* to resolve this conflict and prevent confusion in application of the essential facilities doctrine.

II. THE COURT'S DECISION ON TYING CONFLICTS WITH LONG-STANDING PRECEDENTS OF THIS COURT AND SHOULD BE SUMMARILY REVERSED

Another major reason this court should grant *certiorari* is the Tenth Circuit's egregious error in analyzing tying

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[8] *Otter Tail*, 410 U.S. 366 at 368-71.

claims under § 1 of the Sherman Act. The Tenth Circuit ruled that an agreement between a buyer and a seller is unilateral conduct, and thus may never constitute an illegal tie, where the buyer opposed the arrangement. If it was up to the Tenth Circuit, the contracts in *Kodak*,[9] *Perma Life*,[10] *Albrecht*,[11] *Northern Pacific*,[12] *International Salt*,[13] and many other cases would all have been deemed to be unilateral conduct and thus not a violation of § 1. *Certiorari* should be granted to ensure uniformity in this important area of the antitrust laws.

The court below held that because there was no conspiracy between Cities and WNG to impose the tie, there was no concerted action, and thus no violation of § 1.

> The Cities have only brought evidence that establishes Williams tied its natural gas to its transportation facilities. The Cities have not shown Williams acted in concert with any other entity. The Cities name only one defendant. *The other parties to the allegedly illegal contracts to establish the conspiracy are the Cities themselves.* We conclude the *"Cities have failed to make the requisite preliminary showing of a conspiracy"* to go forth with their tying claims under § 1 of the Sherman Act and find summary judgment is appropriate.

Chanute, 955 F.2d at 650-651, App. 12a-13a (emphasis added).

This analysis is wrong. Section 1 is violated by a "contract, combination *or* conspiracy. . ." (emphasis added). The

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[9] *Eastman Kodak Company v. Image Technical Services, Inc.*, 60 U.S.L.W. 4465, 1992 WL 119156 (June 8, 1992).

[10] *Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134 (1968).

[11] *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968).

[12] *Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1958).

[13] *International Salt Co. v. United States*, 332 U.S. 392 (1947).

Tenth Circuit would change this to "contract, combination *and* conspiracy." A tie imposed by one party (WNG) on a second party (Cities and other WNG customers) provides the multiplicity of actors required to violate § 1. No conspiracy to impose the tie is required. WNG's refusal to transport gas required Cities to purchase gas from WNG under the contractual terms for continued service then in effect between WNG and Cities. This constituted a "contract" within the meaning of § 1. Even though Cities opposed this arrangement, the result was an agreement between two parties to tie sales and transportation in violation of § 1.

A tying arrangement is "an agreement of a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. . . ." *Kodak*, 60 U.S.L.W. at 4468, 1992 WL at 5 (quoting *Northern Pacific*, 356 U.S. at 5-6). The tie in *Kodak* was Kodak's refusal to sell replacement parts to its customers unless they also purchased repair service from Kodak. *Id.*, 60 U.S.L.W. at 4467, 4468, 1992 WL at 3, 5. This tie was imposed solely by Kodak. It was opposed by Kodak's customers, *Id.*, 60 U.S.L.W. at 4468, 4473 n.28, 1992 WL at 5, 11, just like WNG's tie was opposed by Cities and other of WNG's customers. Other examples of tying arrangements where the tie was a contract or provision imposed on a buyer by a seller, not a conspiracy between the buyer and seller (or between the seller and anyone else), include *Perma Life Mufflers*, 392 U.S. at 142 (court repudiated use of *in pari delicto* doctrine as a defense); *Albrecht*, 390 U.S. at 150 n.6 ("[P]etitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with defendant's advertised price."); *Northern Pacific*, 356 U.S. at 3, 5-7; *International Salt*, 332 U.S. at 396; *see, Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 766 (1984) (describing *Perma Life*, this Court noted that "each plaintiff could 'clearly' charge a combination between itself and the

defendants. . . ."); Concurring Opinion, *Chanute*, 955 F.2d at 659, App. 31a (" '[A] plaintiff who contends a seller has unlawfully used a refusal to deal as a means of enforcing an anticompetitive practice (*such as tying* or price fixing) may establish the requisite combination or conspiracy. . . by showing that he himself *unwillingly complied* with the practice. . .' " (quoting *Black Gold, Ltd. v. Rockwool Indus, Inc.*, 729 F.2d 676, 686 (10th Cir. 1984) (emphasis added by Judge Seymour)).[14]

Correction of the lower court's opinion is essential to ensure proper application of the antitrust laws. The court's opinion on this issue, if followed in other cases, would allow sellers to create any type of tie they desired, simply by inserting it into a contract and permitting no discussion or negotiation of it. This would effectively eviscerate the prohibition against tying arrangements.

In addition to the importance of this issue to consistent application of tying principles, this case is important because it establishes antitrust law for customers and competitors of natural gas pipelines. This Court should grant *certiorari* to clarify the rules in these areas.[15]

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[14] The alternative ground for summary judgment on this issue found by Judge Seymour, lack of forcing, is not dispositive. Because WNG had monopoly power under § 2, *Chanute*, 955 F.2d at 648, 654, App. 7a, 21a, and market power sufficient to show forcing under § 1 is not as great as monopoly power, *Kodak*, 60 U.S.L.W. at 4473, 1992 WL at 13, at least a triable issue of market power remains.

[15] While noting that the requirements under a *per se* tying claim are different and that Cities had claimed a *per se* violation, the majority opinion erroneously ignored Cities' *per se* tying claim because it had previously found no tying violation. *Chanute*, 955 F.2d at 651-52, App. 13a-15a. This error requires a reversal and a remand for trial.

Tying is *per se* illegal when a not insubstantial amount of interstate commerce is affected (an issue not challenged by WNG on summary judgment) and anticompetitive forcing is probable. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 (1984). Forcing is probable where the defendant has a high market share. *Id.*, 466 U.S. at 16-17.

III. *CERTIORARI* SHOULD BE GRANTED ON THE GENERAL MONOPOLIZATION CLAIM BECAUSE THE DECISION OF THE COURT BELOW MISAPPLIED CONTROLLING DECISIONS OF THIS COURT

A. The Lower Court's Holding That No Reasonable Jury Could Find WNG Acted With Anticompetitive Intent Conflicts With This Court's Decisions In Otter Tail, Aspen Skiing, and Kodak

The court below affirmed dismissal of Cities' monopolization claim on summary judgment on the basis that WNG's actions, as a matter of law, were motivated by legitimate business concerns. *Chanute*, 955 F.2d at 655-56, App. 23a-25a.[16] The cited concerns, however, were WNG's intent to use its monopoly power to exclude competitors so it could limit its losses and make more profitable sales. This is exactly the behavior condemned in *Otter Tail*, *Aspen Skiing Co.*, and *Kodak*. Every monopolist, indeed every company, strives to reduce losses and increase profits. Allowing this to remain as a defense would allow monopolists to do almost anything they wanted, so long as it would produce more profits for the monopolist. *Certiorari* should be granted to eliminate this opportunity to evade the antitrust laws.

The court of appeals found that WNG's legitimate business justifications were a desire to: (1) prevent take-or-

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Because monopoly power under § 2 was assumed, because WNG was the only interstate pipeline serving Cities, *Chanute*, 955 F.2d at 646, App. 2a, and because WNG had 97% to 98% of the gas sales and 100% of the gas transportation during the one-year period the pipeline was closed, forcing is likely and the lower court erred in ignoring Cities' *per se* tying claim.

[16] The second element required to establish a violation of § 2, monopoly power, was not in dispute. "For purposes of its summary judgment motion, Williams even assumed it was a monopolist in control of an essential facility." *Chanute*, 955 F.2d at 648, App. 7a; *see Chanute*, 955 F.2d at 654, App. 21a ("Williams has monopoly power in the relevant market.").

pay liability, i.e., a desire to limit its losses; (2) prevent conversion of higher profit sales service to lower profit transportation services; and (3) enter into new contracts which WNG said were necessary to enable it to offer a new transportation program. *Chanute*, 955 F.2d at 656, App. 23a-24a. The first two reasons are just another way of saying WNG wanted to use its monopoly power to reduce its losses or make more profits. The third reason is just another way of saying WNG wanted to maintain its monopoly power by forcing its customers to sign new contracts agreeing to purchase gas from WNG instead of WNG's competitors. All of these reasons are attempts "to exclude rivals on some basis other than efficiency,"[17] and thus shows anticompetitive intent, not legitimate business justifications.

The objective of any examination of intent or legitimate business justification is to determine whether the challenged conduct is "exclusionary" or "anticompetitive."[18] This means that the effect of the monopolist's conduct on competition must be examined, not just the effect on the monopolist.

In *Otter Tail*, the defendant claimed it was justified in refusing to transport electricity generated by third parties to municipalities with which the defendant was interconnected because if many customers did this, the defendant would lose customers and make less money. *Otter Tail*, 410 U.S. at 380. This Court rejected the argument, noting that "the promotion of self-interest alone" is not a defense.[19] Monopolists can compete by offering "superior service, lower costs, and improved efficiency," *Id.*, not by

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[17] *Aspen Skiing*, 472 U.S. at 605 (quoting R. Bork, The Antitrust Paradox 138 (1978)).

[18] *Aspen Skiing*, 472 U.S. at 602.

[19] *Id.* (quoting *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967)).

excluding competitors, limiting customers' alternatives and forcing customers to pay a higher price.[20]

The court's second error was in granting summary judgment on the business reasons proffered by WNG. In both *Kodak* and *Aspen Skiing*, this Court carefully examined, and rejected, the justifications offered. The court of appeals below merely accepted the explanation stated by WNG, with no critical examination as to whether they were pretexts. The court ignored Cities' evidence whereby the jury could conclude that WNG's business justifications were mere pretexts for WNG's desire to suppress competition and raise prices so it could make higher profits. This violated long-standing standards for determining the propriety of summary judgment and requires a grant of *certiorari* by this Court.

WNG's conduct and reasons for its conduct are indistinguishable from those offered by the regulated utility in *Otter Tail*. This Court should grant *certiorari* to ensure compliance with its precedent in *Otter Tail*. Failure to grant *certiorari* would leave current and prospective plaintiffs and defendants and the lower courts in confusion as to whether *Otter Tail* should continue to be followed.

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[20] The Tenth Circuit claimed *Otter Tail* did not apply because Cities signed contracts agreeing to the exclusionary practice and because FERC could force WNG to transport gas to Cities. Neither is correct. As the court recognized, contracts cannot immunize conduct that otherwise would be illegal. *Chanute*, 955 F.2d at 651, App. 13a (quoting *United States v. Loew's, Inc.*, 371 U.S. 38, 51 (1962). In addition, the old written contracts for five of the Cities expired prior to the end of WNG's monopolization. Second, transportation of third party gas was voluntary. FERC could not force WNG to transport third party gas to Cities. *Assoc. Gas Dist.*, 824 F.2d at 996.

B. The Lower Court Erroneously Found No Standing As To The Three Cities Having Old Contracts With WNG Because It Confused Violation With Antitrust Injury And Misapplied Summary Judgment Standards

The court's conclusion, that the three customers with old unexpired written contracts with WNG have no antitrust standing, is completely inconsistent with settled antitrust precedent. This Court should grant *certiorari* to correct this error.[21]

Second, WNG's refusal to transport third party gas to Cities impaired competition in both the wholesale and retail gas markets. The lower court's statements that Cities did not produce evidence of the effect the contracts had on competition or that third parties would have sold gas to Cities, but for the contracts with WNG, is plainly incorrect. This failure to apply the proper standards for summary judgment actions also requires a remand.

1. The Majority Opinion Confused Antitrust Standing/Injury With Violation Of The Antitrust Laws

Antitrust standing and injury depend on the relationship between the violation alleged and the injury claimed by the plaintiffs. As explained by Judge Seymour's concurrence, the majority misapplies this Court's precedent on standing and antitrust injury by focusing solely on the circular question of whether or not the antitrust laws were violated. The majority also is in conflict with a decision of the United States Court of Appeals for the Fourth

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[21] This standing/injury issue applied only to the Cities with written contracts with WNG. *Chanute*, 955 F.2d at 651 n.13, App. 14a. It did not limit the ability to sue of two Cities whose written contracts expired prior to August, 1987 or three other Cities whose written contracts expired in April, 1988, for the period after these three written contracts expired. *Id.*

Circuit which held that purchasers of tied products do have antitrust standing and antitrust injury.

Antitrust standing requires an analysis of five factors: (1) injury in fact: (2) injury to business or property; (3) injury of the type the antitrust laws were intended to prevent; (4) causal connection between violation and injury; and (5) whether injury flowed from that which makes the acts unlawful.[22] No one factor is determinative. Each must be examined and weighed. *Associated*, 459 U.S. at 536 n.33 (Stevens, concurring) (courts "should analyze each situation in light of these factors"). While the majority opinion noted these factors,[23] it neither applied nor balanced them. Antitrust injury is defined as injury of the type the antitrust laws were designed to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*; 429 U.S. 477, 489 (1977). Because the defendant's actions reduced competition at wholesale, and as a result increased the wholesale price of gas, just the type of injury the antitrust laws were designed to prevent, summary judgment on antitrust injury was not appropriate. As explained by Judge Seymour's Concurring Opinion, the majority determined there was no standing or injury because it found no violation of the antitrust laws.[24] "The question of the relationship between the asserted antitrust violations and the antitrust injury, the heart of the standing and antitrust injury cases, is not discussed by the majority." *Id.* The majority would collapse these three independent items (injury, standing and violation) into one. This Court should grant *certiorari* to correct this distortion of the proper analysis.

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[22] *Associated General Contractors v. California State Council of Contractors*, 459 U.S. 519 (1983); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476 (1982); P. Areeda & H. Hovenkamp, Antitrust Law § 334.1 (Supp. 1989).

[23] *Chanute*, 955 F.2d at 652 n.14, App. 16a.

[24] *Chanute*, 955 F.2d at 659-60, App. 32a-34a.

The majority opinion also is in conflict with the Fourth Circuit which has held that plaintiffs that sign a contract containing a tying arrangement have antitrust standing and antitrust injury. *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1279 (4th Cir. 1987).

2. The Majority Opinion Misapplied This Court's Standards For Summary Judgment

Summary judgment is appropriate only where a reasonable trier of fact could not find for the party opposing summary judgment. *Kodak*, 60 U.S.L.W. at 4468, 1992 WL at 6. Cities' evidence "'is to be believed, and all justifiable inferences are to be drawn in [Cities'] favor.'" *Kodak*, 60 U.S.L.W. 4466, 1992 WL at 3 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The majority violated this standard when it found that Cities had presented no evidence of the effect of the contracts on competition or that other gas suppliers would have sold to Cities but for Cities' contracts with WNG. *Chanute*, 955 F.2d at 652, App. 15a.

Cities did present evidence of anticompetitive effects on the markets for both wholesale and retail gas sales. Cities showed WNG's refusal to transport third party gas limited competition and raised the price of wholesale gas. The gas price before WNG closed the pipeline was about $1.00/Mcf (25% to 40%) lower than the price during the 12 months WNG refused to transport the third party gas. This evidence consisted of admissions from WNG, comparisons of actual gas prices and analyses by Cities' economist. Cities also explained that because they had to raise their retail prices to cover the increase in the wholesale price of gas, they lost customers, sales and profits at retail. Finally, Cities demonstrated that other sellers were ready to sell gas to Cities, but for WNG's refusal to transport that gas. *Chanute*, 955 F.2d at 646, 647, App. 3a, 6a. Even the district court recognized this. *City of Chanute, et al. v.*

Williams Natural Gas Co., 678 F.Supp. 1517, 1521 (D. Kan. 1988), App. 130a; *Chanute*, 955 F.2d at 647, App. 6a. Judge Kelly found that some Cities had signed new contracts with third party suppliers and other Cities had agreed on, and would have signed, new contracts with third party suppliers but for WNG's refusal to transport the gas. *Id.* This "direct evidence"[25] of higher prices and lost contracts as a result of WNG's conduct, plus the fact that Cities' "inferences [are] reasonable,"[26] demonstrates that the majority misapplied this Court's rulings on summary judgment.

CONCLUSION

WHEREFORE, Cities respectfully request that this Court grant *certiorari* on the issues requested herein, and Cities respectfully suggest that summary reversal would be appropriate for the tying issue.

Respectfully submitted,

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June 25, 1992

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[25] *Kodak*, 60 U.S.L.W. at 4472, 1992 WL at 12.

[26] *Kodak*, 60 U.S.L.W. at 4470, 1992 WL at 8.

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 90-3273, 90-3313, and 90-3369

CITY OF CHANUTE, KANSAS; CITY OF AUBURN KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,

Plaintiffs, Appellants,

v.

WILLIAMS NATURAL GAS COMPANY,

Defendant, Appellee.

Decided Jan. 30, 1992

Rehearing Denied March 27, 1992

Charles F. Wheatley, Jr. (Don Charles Uthus, Peter A. Goldsmith, Timothy P. Ingram, Pace J. McConkie, and Allen D. Freemyer of Wheatley & Ranquist, Annapolis, Maryland; Larry D. Hendricks and Ronald Greg Wright of Stumbo, Stumbo, Hanson & Hendricks, Topeka, Kansas; Robert Pennington of Henshall, Pennington & Brake, Chanute, Kansas, with him on the briefs) of Wheatley & Ranquist, Annapolis, Maryland, for plaintiffs-appellants.

John T. Schmidt (Mary J. Rounds of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, Okl., and C. Kevin Morrison of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Washington, D.C.; Donald W. Bostwick and Teresa James of Adams, Jones, Robinson & Malone,

Chartered, Wichita, Kan.; Lewis A. Posekany, Gen. Counsel, Williams Natural Gas Co., Tulsa, Okl.; Bobby E. Potts, Associate Gen. Counsel, and William J. Sears, Chief Regulatory Counsel, The Williams Companies, Inc., Tulsa, Okl., with him on the briefs) of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., Tulsa, Okl., for defendant-appellee.

Before SEYMOUR, BARRETT and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

In this antitrust case, eight cities ("the Cities"), sued Williams Natural Gas Company ("Williams") asserting Sherman Antitrust Act ("Sherman Act") violations. Specifically, the Cities protest Williams' decision to terminate a temporary program whereby the Cities could purchase gas from third party suppliers which Williams would transport over its pipeline. The district court granted summary judgment in favor of Williams. We affirm.

BACKGROUND[1]

The Cities purchase natural gas at wholesale and then resell it to customers located in the cities and surrounding areas. Williams owns and operates the only interstate pipeline serving the Cities. Each of the Cities has had a "full requirements" contract with Williams. These contracts require the Cities to purchase all their natural gas from Williams and Williams agrees to have a sufficient supply of natural gas to meet the Cities' demands. In December 1986, Williams sought regulatory approval to allow it to transport gas from third party suppliers on a permanent

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[1] A complete history of this case, as well as a history of the natural gas industry is set forth in more detail in *City of Chanute v. Williams Natural Gas Co.*, 678 F. Supp. 1517 (D. Kan. 1988) ("*Chanute I*"); *City of Chanute v. Williams Natural Gas Co.*, 1990-1 Trade Cas. P 68,967, 1990 WL 20019 (D. Kan. Feb. 16, 1990) ("*Chanute II*"); and *City of Chanute v. Williams Natural Gas Co.*, 743 F. Supp. 1437 (D. Kan. 1990) ("*Chanute III*").

basis.[2] At the time, under the full requirements contracts, Williams only transported its own gas over the pipeline. While awaiting approval, Williams initiated a temporary program to transport third party gas for the Cities.[3] FERC granted Williams approval to waive the full requirements provisions in existing contracts with the Cities to effectuate this temporary program. Otherwise, these full requirement provisions would have precluded the Cities from being able to purchase gas from third party suppliers even though Williams would transport the gas over its pipeline. This waiver did not relieve Williams from its obligation to serve the Cities' full requirements on demand. The Cities began to negotiate and enter into agreements for gas from other suppliers. During the time the temporary program was in effect, while the Cities were purchasing third party gas, Williams experienced difficulty paying its suppliers.[4]

Originally, the temporary program was to run from December 1986 until May 1987. Williams was able to extend it until August 1, 1987, when Williams ended its temporary program and closed its pipeline to those alternate suppliers ("closed period"). However, FERC regulation obligated Williams to transport certain third party gas ("approved third party suppliers") that was still available to the Cities.[5]

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[2] Williams sought a transportation tariff pursuant to Order No. 436, 50 Fed. Reg. 42,408 (1985), issued by the Federal Energy Regulatory Commission ("FERC"). FERC is the regulatory agency that governs the natural gas industry.

[3] Williams initiated this interim open-access program pursuant to § 311 of the Natural Gas Policy Act, 15 U.S.C. § 3371 (1978).

[4] Williams had take-or-pay provisions in its contracts with natural gas suppliers. A take-or-pay provision obligates a pipeline to pay for certain volumes of gas even if the pipeline is unable to sell that amount to its customers.

[5] Williams was still required to transport third party gas pursuant to FERC's Order No. 451 which "established procedures for the renegotiation of low, old, Pre-NGPA gas prices and the release of gas

In July 1988, FERC approved Williams' permanent plan, which enabled the Cities to once again purchase gas from any third party supplier. Thereafter, the Cities negotiated with other third party suppliers to obtain gas which Williams would transport over its pipeline.

The Cities brought suit alleging Williams violated §§ 1 and 2 of the Sherman Act. The Cities sought antitrust damages for the time period Williams closed its pipeline to the transportation of third party gas, August 1987 until July 1988. The district court granted summary judgment for Williams. The Cities appeal asserting seven errors, which we address separately.

I. SUMMARY JUDGMENT

We recognize the prevailing sentiment that summary judgment should be used sparingly in antitrust cases. *See Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). Summary judgment should be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, when the moving party identifies evidence that demonstrates no genuine issue of material fact remains, the nonmoving party must go beyond the pleadings and present to the court the specific evidence that indicates a genuine factual issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d. 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The existence of some disputed facts does not automatically preclude granting summary judgment. *Anderson*, 477 U.S. at 247-48, 106 S.Ct. at 2509-10. If the nonmoving party does not make a sufficient showing of a material fact, all other facts are rendered immaterial and summary

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covered by such pre-NGPA gas purchase contracts." *Chanute I*, 678 F. Supp. at 1524-5.

judgment is appropriate *Celotex*, 477 U.S. at 322-23. 106 S.Ct. at 2552. We remain mindful that summary judgment in antitrust cases is disfavored. *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 505, 89 S.Ct. 1252, 1259, 22 L.Ed.2d 495 (1969).

Reviewing a grant of summary judgment on appeal, "[w]e apply a de novo standard of review to the court's conclusions of law," and view the "record liberally in favor of the party opposing the motion for summary judgment." *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 367 (10th Cir. 1988). *See also Anderson v. Health & Human Servs.*, 907 F.2d 936, 946-47 (10th Cir. 1990). We are not limited to the grounds upon which the trial court relied but may base summary judgment on any proper grounds found in the record to permit conclusions of law. *United States v. Colorado*, 872 F.2d 338, 339 (10th Cir. 1989). The trial judge must deny a summary judgment motion when reasonable jurors might disagree, even if the judge would find for the moving party. *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1377 (10th Cir. 1988). Thus, where the reviewing judge may properly draw different ultimate inferences, summary judgment cannot be entered. *Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co.*, 817 F.2d 639, 644 (10th Cir. 1987). Because summary judgment involves purely legal determinations, we review the district court's decision to grant summary judgment de novo. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991).

II. ESSENTIAL FACILITIES DOCTRINE

The Cities allege Williams' decision to close the pipeline violated § 2 of the Sherman Act which prohibits monopolies in interstate trade or commerce. 15 U.S.C. § 2. One way federal courts enforce this prohibition is through the use of the essential facilities doctrine. *McKenzie*, 854 F.2d at 368-69. The essential facilities doctrine is a test courts can apply to alleged monopolistic conduct to determine whether

the conduct violates the antitrust laws. Federal courts of appeals have adopted a four-part test to determine if a monopolist's conduct violates § 2 under this doctrine. *Id.* at 369. To prevail under the essential facilities doctrine the Cities must show: (1) Williams is a monopolist in control of the pipeline that is essential to competition in the retail natural gas market; (2) the Cities' inability to duplicate, practically or reasonably, the pipeline access; (3) Williams has denied the Cities use of the pipeline; and (4) the feasibility of Williams providing the pipeline to the Cities. *See MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983).

The Cities presented evidence they competed with Williams at the retail level for new users and larger commercial and industrial users. The undisputed facts show Williams operated the only natural gas pipeline in the area of the Cities. Economically, it was not feasible for the Cities to physically duplicate the pipeline. *Chanute I*, 678 F. Supp. at 1533. Williams temporarily closed its pipeline to the transportation of third party gas even though the Cities either had long term contracts or were negotiating long term contracts for that third party gas. *Id.* at 1521. Williams did not close the pipeline because of FERC regulations. Once Williams closed its pipeline, it entered into new five-year contracts with the Cities which required the Cities to pay demand charges year-round even if they purchased no gas from Williams. Williams' gas was more expensive than the other third party suppliers' gas. The approved third party suppliers' gas that Williams continued to transport was short-term and interruptible,[6] whereas the other third party suppliers provided long term, firm and much cheaper gas.[7] *Id.* at 1521.

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[6] Interruptible service does not guarantee that a producer will have sufficient supplies of natural gas to meet all consumers' demands.

[7] Firm service does guarantee that consumers' demands will be met.

Williams moved for summary judgment bringing evidence that as an interstate pipeline, it is subject to "pervasive regulation" by FERC. *Id.* at 1522. During the closed period, Williams provided all the Cities' natural gas requirements and transported approved third party suppliers' gas. The Cities received offers from those approved third party suppliers but did not consider any purchases. The price at which Williams offered gas to the Cities was regulated by FERC under the "just and reasonable" standard. 15 U.S.C. § 717c(a) (1988); *Chanute I*, 678 F.2d at 1523. For purposes of its summary judgment motion, Williams even assumed it was a monopolist in control of an essential facility.

The district court applied the essential facilities doctrine and granted summary judgment because the Cities were unable to establish two elements of the test: a competitor's inability practically or reasonably to duplicate the facility, and the denial of use of the facility to the competitor. The Cities assert as error: (1) the district court ignored its own findings made at the preliminary hearing, namely, evidence showed the facility could not be physically duplicated and the approved third party suppliers' gas was not a feasible substitute for other third party gas; and (2) at least a genuine issue of fact exists whether the approved third party suppliers' gas was a feasible alternative to other third party gas.[8]

We hold the Cities have failed to meet their burden under the essential facilities doctrine. It is the Cities "task to demonstrate the presence of all these elements. . . . If even one element is absent, [their] argument under the [essential facilities] doctrine is unavailing." *McKenzie*, 854

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[8] The Cities also assert that Order 451, which authorized the approved third party suppliers, has been declared unlawful and should not be considered. The district court found this argument specious. *Chanute II*, 1990-1 Trade Cas. ¶ 68,967 at 18. We agree. This argument merits no discussion.

F.2d at 370. To establish elements two and three of the doctrine, the Cities must show Williams did not provide access to its pipeline on reasonable terms, equivalent to a denial of access. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912). Access to an essential facility must be "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *Id.* at 411, 32 S.Ct. at 516. In other words, the Cities must present evidence Williams denied or limited access to its pipeline solely to gain a competitive edge.[9] Any denial of the pipeline must result in a "severe handicap" to the competitor Cities. *Twin Labs., Inc. v. Wieder Health & Fitness*, 900 F.2d 566, 568 (2d Cir. 1990). The Cities have not met this burden.

"As the word 'essential' indicates, [the Cities] must show more than inconvenience, or even some economic loss; [they] must show that an alternative to the facility is not feasible." *Id.* at 570. The undisputed facts show the Cities have not met such an onerous burden. The Cities have failed to show any "severe handicap" endured as a result of Williams providing the Cities' full requirements of natural gas as opposed to transporting third party gas. During the time Williams closed the pipeline, it still supplied the Cities' full requirements of natural gas. Although Williams' gas was more expensive than other third party suppliers, that in and of itself does not make the Cities' access to the pipeline unreasonable. Nor does it follow that access during the closed period was unreasonable simply because

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[9] But Williams does not have to share its pipeline "if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." *Hecht v. Pro-Football Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978).

the price of Williams' gas was higher under the new contracts with the Cities. Williams provided the Cities' full gas requirements during the closed period at FERC approved prices. Furthermore, the Cities could have obtained cheaper third party gas during the closed period from a number of approved third party suppliers.

The Cities assert they lost long term, low price gas contracts with third party suppliers because of Williams' conduct. The Cities also contend the approved third party suppliers' gas did not meet their requirements. As a matter of law, we find Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines. This conclusion is strengthened by the fact Williams would also have transported less expensive gas from the approved third party suppliers. The Cities have not presented facts that show anything other than inconvenience or economic loss. The Cities suffered no "severe handicap" as a result of Williams' temporary closure, and once Williams reopened the pipeline, the Cities were able to obtain new contracts with third party suppliers. Accordingly, the Cities did not establish the second and third elements of the essential facilities doctrine. Reasonable access defeats the second element of the test because if the Cities have reasonable access it follows they can "practically . . . duplicate the facility." *Id.* at 568. The third element, denial of use of the facility is also defeated where the Cities have reasonable access to the pipeline. The undisputed evidence shows Williams provided reasonable access to the pipeline. We hold the district court did not err by granting summary judgment on this issue.

The Cities' assertion the district court ignored its previous factual findings is irrelevant. In a summary judgment proceeding, the district court is not bound by its prior factual findings determined in a preliminary injunction hearing. *See* Fed. R. Civ. P. 54(b); *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981); *Lindsey v. Dayton-Hudson Corp.*, 592

F.2d 1118, 1121 (10th Cir.), *cert. denied*, 444 U.S. 856, 100 S.Ct. 116, 62 L.Ed.2d 75 (1979).

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. . . .

Camenisch, 451 U.S. at 395, 101 S.Ct. at 1834 (citation omitted). Thus, the fact the Cities prevailed at the preliminary injunction stage is not determinative in a summary judgment proceeding. We are affirming the grant of a summary judgment motion. Simply because the trial court may have weighed evidence differently at different stages of the proceedings does not establish a genuine issue of fact.

Nor is the Cities' argument persuasive that a genuine issue of fact remains whether the approved third party suppliers' gas was a feasible alternative to other third party gas. As noted above, to be so unreasonable to rise to a denial of access the Cities must suffer "severe handicap." Although the approved third party suppliers' gas may not be an exact substitute, it is not so unreasonable as to cause the Cities a "severe handicap." Furthermore, we have concluded the gas Williams itself provided was reasonable enough access to defeat the Cities' claim.

III. TYING CLAIM

The Cities claim Williams' refusal to transport gas unless the Cities purchased Williams' gas constituted an illegal tying arrangement in violation of § 1 of the Sherman Act which prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. One way the courts analyze § 1 violations is to look for the existence of a tying arrangement. A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958); *McKenzie*, 854 F.2d at 368 n.9. These arrangements do not pass antitrust scrutiny when the seller has the market power to "force" the purchaser to do something he would not do in a competitive market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14, 104 S.Ct. 1551, 1558-59, 80 L.Ed.2d 2 (1984). The Cities assert the requirements contracts tied natural gas transportation (tying product) to the natural gas sales market (tied product).

Williams moved for summary judgment asserting the Cities were not "forced" to purchase Williams' natural gas to obtain transportation service and the Cities cannot show Williams had an economic interest in the tying product.

The district court granted summary judgment finding the Cities failed to show any agreement between two or more parties and Williams did not "force" the Cities to buy its natural gas. *Chanute II*, 1990-1 Trade Cas. ¶ 68,967 at 17. The Cities assert: (1) the district court erred by not finding the existence of the necessary agreement between parties because the requirements contracts between Williams and the Cities constitute the necessary agreement; and (2) the approved third party suppliers' gas does not provide a defense to Williams "forcing" the sale of its natural gas.

Before they can establish a § 1 violation, the Cities "must prove an agreement . . . between separate parties to restrain trade." *Smith Machinery Co., Inc. v. Hesston Corp.*, 878 F.2d 1290, 1294 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073, 110 S. Ct. 1119, 107 L.Ed.2d 1026 (1990). The Cities must show the alleged tying arrangement is "concerted activity by individual actors." *Card v. National Life Ins. Co.*, 603 F.2d 828, 834 (10th Cir. 1979). A violation of § 1 requires " 'unlawful conduct by two or more parties pursuant to an agreement. . . . Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited.' " *McKenzie*, 854 F.2d at 367 (quoting *Contractor Utility Sales Co. v. Certainteed Prods. Corp.*, 638 F.2d 1061, 1074 (7th Cir. 1981)). "[A] business retains the right under section 1 to *unilaterally* announce the terms on which it will deal." *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 963 (10th Cir.) *cert. denied*, ___ U.S. ___, 110 S. Ct. 3241, 111 L.Ed.2d 752 (1990). The Cities assert the requirements contract between Williams and the Cities entered into after the pipeline had been closed is a sufficient showing of an illegal agreement.[10]

The Cities' assertion is erroneous. We held in *McKenzie* that a tying arrangement imposed by a single entity is not proscribed by § 1 of the Sherman act. *McKenzie*, 854 F.2d at 368. In that case, the plaintiff asserted "an arrangement which links two separate and distinct product markets together" is sufficient proof of a tying arrangement. *Id.* We disagreed and held the plaintiff must make a preliminary showing of a conspiracy between two persons. *Id.* at 367-68. The Cities have only brought evidence

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[10] In *United States v. Loew's Inc.*, 371 U.S. 38, 40, 83 S.Ct. 97, 99, 9 L.Ed.2d 11 (1962), the Court allowed a claim under § 1 where "[n]o combination or conspiracy among [defendants] was alleged." Whether a plaintiff must first show the existence of an agreement or conspiracy was not presented to the Supreme Court in this case and was not part of its holding.

that establishes Williams tied its natural gas to its transportation facilities. The Cities have not shown Williams acted in concert with any other entity. The Cities name only one defendant. The other parties to the allegedly illegal contracts to establish the conspiracy are the Cities themselves. We conclude the Cities have failed to make the requisite preliminary showing of a conspiracy to go forth with their tying claims under § 1 of the Sherman Act and find summary judgment is appropriate.[11]

IV. RECOVERY UNDER THE CLAYTON ACT

The Cities claim they suffered antitrust injury entitling them to treble damages under § 4 of the Clayton Act which allows recovery of treble damages if the plaintiff can show it has been "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a) (1988).

The Cities contend the full requirements contracts themselves are violative of antitrust law and the Cities are therefore entitled to treble damages. The Cities argue the fact that the contracts obligated them to purchase all their gas from Williams cannot immunize Williams from the antitrust injury caused by enforcing the allegedly illegal contracts. "[T]he thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified." *Loew's*, 371 U.S. at 51, 83 S.Ct. at 105. Alternatively, the Cities suggest even if the requirements contracts themselves do not violate the antitrust laws, Williams waived the Cities' full requirements obligation. Therefore, the contracts did not preclude the Cities from suffering an antitrust injury because the Cities had a legal right to purchase third party gas.

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[11] The Cities claims of error regarding "forcing" of a tying arrangement are necessarily rendered moot.

Williams moved for summary judgment asserting six of the Cities had full requirements contracts for all or part of the relevant period[12] and therefore did not have standing to allege antitrust injury. In other words, § 1 of the Sherman Act is interpreted to prohibit only "unreasonable restraints" on trade. *Reazin*, 899 F.2d at 959. Williams asserts closing the pipeline did not unreasonably restrain natural gas trade because the Cities were contractually obligated to purchase all their gas from Williams. Accordingly, closing the pipelines to third party gas did not injure the Cities, because the Cities had no legal right to purchase third party gas.

The district court granted summary judgment and found due to the extant full requirements contracts the Cities did not suffer any antitrust injury. The Cities therefore lacked standing to recover treble damages under § 4 of the Clayton Act.[13] On appeal the Cities assert: (1) contract immunity is not a defense to a claim of antitrust injury; and (2) the court erred by ruling the failure to list damages for the cutoff of third party gas in the pretrial order barred the Cities from recovering them.

First, the Cities assert the original full requirements contracts are in violation of § 1 because they unreasonably restrain trade. The Cities argue the alleged illegal contracts provide the basis for them to recover Clayton Act damages. As proof, the Cities offer they were forced to accept the contracts as Williams was the only pipeline available to them. We disagree.

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[12] At one time each of the Cities had full requirements contracts with Williams. Through periodic renewals, the contracts for three cities were to continue in effect until July 22, 1988. Contracts for three other cities were to continue in effect until April 22, 1988.

[13] The cities whose contracts expired after permanent open access began were denied any standing. The cities whose contracts expired in April were found to have standing from the time the contract expired until the permanent open access began. *Chanute II*, 1990-1 Trade Cas. ¶ 68,967 at 16-17.

We examine the contracts to see if they violate the antitrust laws under one of two standards: (1) whether the contract is a per se violation or (2) whether the purpose or effect of the contract is to unreasonably restrain trade. *Cayman Exploration Corp. v. United Gas Pipeline Co.*, 873 F.2d 1357, 1359-60 (10th Cir. 1989). Many *per se* violations have been found in horizontal or vertical price fixing schemes. *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 640 (10th Cir. 1987). Because we have no evidence of such a scheme or otherwise blatantly egregious conduct, we examine the purpose or effect of the contract under the standard typically termed the Rule of Reason. Under this rule, the court examines "whether the challenged agreement is one that promotes competition or one that suppresses competition." *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). The Cities bear the burden of proving their full requirements contracts with Williams had an adverse effect on competition. *Smith Machinery*, 878 F.2d at 1298. The key inquiry is whether the Cities can support the existence of an actual "adverse effect on competition", with more than conclusory allegations. *Key*, 828 F.2d at 642.

The Cities did not produce evidence of the effect the contracts had on competition. Instead, they offered evidence of the effect the contracts had on the Cities themselves. The Cities offered no evidence that other gas suppliers would have sold to them but for the existence of their contracts with Williams. Mere allegations of anticompetitive effect are insufficient to require application of the rule, because there are no facts that could support a finding of an antitrust violation. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Therefore, as the Cities have failed to provide evidence to withstand a summary judgment motion, the contracts cannot provide a basis for the Cities to recover Clayton Act damages.

Next, we determine whether the Cities have any standing to recover under § 4 of the Clayton Act. Whether a plaintiff has standing to bring a cause of action is a question of law for the court to determine. *Motive Parts Warehouse v. Facet Enters.*5, 774 F.2d 380, 389 (10th Cir. 1985). In this circuit, we determine standing in antitrust cases by applying a two-prong test. To meet the first prong the Cities must allege a business or property injury, an antitrust injury, as defined by the Sherman Act. *Id.* An antitrust injury is defined as a "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). "A violation of the Act without resultant injury to the [plaintiff] is insufficient to confer standing." *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1187 (10th Cir. 1983).[14] To establish the second prong of antitrust standing, the Cities must show the antitrust injury resulted directly from Williams' violation of antitrust law. *Facet*, 774 F.2d at 389.[15]

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[14] Standing and antitrust injury are essential elements in § 4 Clayton Act damage actions. *Reazin*, 899 F.2d at 960. Recent Supreme Court cases closely link standing to a showing of antitrust injury. *Id.* at 961. An antitrust injury is different from antitrust standing. *Axis, S.P.A. v. Micafil, Inc.*, 870 F.2d 1105, 1108-09 (6th Cir. 1989). Standing cannot be established without an antitrust injury, but the existence of an antitrust injury does not automatically confer standing. *Id.* The following factors should be considered when evaluating antitrust standing: (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicative recoveries or complex damage apportionment. *Reazin*, 899 F.2d at 962 n.15.

[15] Proximate cause can be shown by the following: (a) causal connection between the antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damages,

To determine whether the Cities' alleged injury—inability to purchase third party gas—meets the first prong of the test as an antitrust injury we examine the alleged antitrust violation. The Supreme Court has determined claims of antitrust injury "are compensable only when the injury flows directly from the unlawful act." *Axis*, 870 F.2d at 1107. The injury must occur not only "by reason of" the act, but also "by reason of" that which made the act unlawful. *Brunswick*, 429 U.S. at 488, 97 S.Ct. at 697.

The alleged unlawful act in this case is temporarily closing the pipeline to the transportation of third party gas. However, if Williams had not waived the full requirements contract provisions with the Cities, the Cities would have suffered the same injury—inability to purchase third party gas. By closing the pipeline, Williams did not violate the antitrust laws by unreasonably restraining trade. Had Williams never instigated the temporary program that allowed the Cities to purchase third party gas, the Cities would have suffered the same consequences. "If a monopolist does extend a helping hand, though not required to do so, and later withdraws it" no antitrust liability is incurred. *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987). Williams was not obligated to provide the temporary program. Williams provided the temporary program pursuant to FERC approval, not FERC requirements.[16] Nor was Williams required to obtain FERC approval to withdraw its temporary program. *See Williams Natural Gas Co.*, 43 FERC (CCH) ¶ 61,227 (May 5, 1988); *ANR Pipeline Co.*, 39 FERC ¶

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and (b) the illegal act linked to plaintiff engaged in activities intended to be protected by antitrust laws. *Facet*, 774 F.2d at 389.

[16] The program was initiated pursuant to § 311 of the Natural Gas Policy Act. 15 U.S.C. § 3371. This section authorized FERC to permit open access but did not authorize FERC to order the pipelines to do so. *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991).

61,341 at 61,077 (June 19, 1987). Consequently, Williams' decision to close the pipeline did not result in an antitrust injury to the Cities because Williams was not obligated to institute a temporary program in the first place. Thus, the Cities have not established the first prong of the antitrust standing test—an antitrust injury.

The Cities attempt to characterize Williams' waiver of the full requirements contract provisions as a permanent waiver. In this case the Cities claim they suffered an antitrust injury because once Williams closed the pipeline they were still entitled to receive third party gas. However, the Cities have provided no facts upon which we can conclude Williams' waiver was permanent. Williams requested a "temporary waiver of the full requirements provisions" of its contacts with the Cities. *Northwest Central Pipeline Corp.*,[17] 36 FERC ¶ 61,371 at 61,907 (September 26, 1986). FERC granted the waiver to enable Williams to implement its temporary program. *Id.* Although in a later order FERC recognized Williams had the authority to revoke its decision to close the pipeline, this does not indicate FERC found the waiver to be in effect when the temporary program was not. *See Williams Natural Gas Co.*, 42 FERC ¶ 61,189 (February 19, 1988). Because FERC granted the waiver for the purpose of implementing the temporary program, once the program terminated so did the waiver. Accordingly, the Cities' full requirements obligations resumed once the pipeline was closed. The Cities have not persuaded this court they suffered an antitrust injury due to Williams closing the pipeline when Cities had no right to purchase third party gas due to the effect of the full requirements provisions. The Cities have failed to establish an antitrust injury as required by the first prong of the standing test. Thus, we do not reach an examination

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[17] Northwest Central is Williams predecessor and is considered the same entity for purposes of this discussion.

of whether the alleged antitrust injury resulted directly from Williams' violation of the antitrust laws.

Because we conclude the Cities lack standing to recover under § 4, we need not reach the Cities' second claim of error that the district court should not have barred their recovery because the damages were not set out in the pleadings or pretrial order.

V. MONOPOLIZATION CLAIM

The Cities assert a monopolization claim under § 2 of the Sherman Act. 15 U.S.C. § 2. To establish a claim of monopolization under § 2, the Cities must show Williams had "the possession of monopoly power in the relevant market" and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966); *see also Reazin*, 899 F.2d at 973; *Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819, 823-24 (10th Cir. 1987). In this circuit, we define monopoly power as the ability *both* to control prices and exclude competition. *Bacchus*, 939 F.2d at 894. The relevant market includes both product market and geographic market. "A product market includes those products which are reasonably interchangeable by consumers for the same purposes." *Bacchus*, 939 F.2d at 893; *United States v. E.I du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed.2d 1264 (1956). We hold the relevant product market to be the sale and transportation of natural gas. The relevant geographic market is the area encompassing the plaintiff cities. *Chanute I*, 678 F. Supp. at 1532.

The Cities presented many affidavits concerning Williams' decision to close the pipeline. One expert testified the reasons Williams closed its pipeline were to control access to the pipeline, to maintain a large portion of its

sales function and to increase its profit levels. One city clerk testified Williams' representatives told her Williams was not pleased with the existing contracts and wanted to enter new ones which Williams believed necessary to offer a permanent program with the same terms as the temporary program. Another economic expert found Williams

> experienced a significant erosion in its sales volumes as [customers] converted to transportation. In other words, it was losing market share in the *sales* market as customers took advantage of open access [18] to contract with alternative suppliers. [Williams] acted to end open access in order to prevent this loss of market share, and in order to prop up the price that it received for its product.

Williams earned a higher margin on sales of gas than it did on transportation. The Cities assert Williams had one of the lowest take-or-pay liabilities among all the interstate pipelines in the country.

Williams moved for summary judgment arguing the record reflects it did not abuse its monopoly power. Williams does not dispute the basic facts the Cities offered. Williams' 1987 Annual Report to Shareholders states: "The company discontinued its interim open access program on August 1 to avoid incurring unacceptable take-or-pay deficiencies and loss of margins resulting from conversion of sales to lower margin transportation service." In the same report, Williams stated it expected to recoup most of its take-or-pay liability in early 1988. Williams' best estimates of its potential take-or-pay liability for the difference between closing the pipeline and leaving it open, at the time it made its decision, was $12.1 million.

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[18] Open access refers to the transport of third party gas over Williams pipeline as it was during the temporary program and ultimately under the permanent plan.

The trial court granted Williams' summary judgment motion and found Williams' conduct was not anticompetitive, but rather the result of a legitimate business decision given the regulatory turmoil present in the natural gas industry. *Chanute III*, 743 F. Supp. at 1460-61. The Cities appeal asserting: (1) the trial court erred by finding regulatory turmoil immunized Williams' conduct; (2) the trial court applied the wrong legal standard to evaluate intent; and (3) genuine issues of material fact remain necessitating a trial on the merits.

Viewing the facts in the light most favorable to the Cities, we conclude the Cities have established the first part of the test—Williams has monopoly power in the relevant market. We next examine Williams' conduct to determine if closing the pipeline constituted willful maintenance of monopoly power. Intent determines whether the challenged conduct is fairly characterized as exclusionary or anticompetitive. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602, 105 S.Ct. 2847, 2857, 86 L.Ed.2d 467 (1985).[19] General intent is all that is necessary to establish a monopolization claim. *Reazin*, 899 F.2d at 973. "Section 2 is violated when monopoly power is gained or held by conduct constituting an abnormal response to market opportunities." *Instructional Systems*, 817 F.2d at 649. "In order to rise to a section 2 violation, however, the exclusionary conduct must appear reasonably capable of contributing significantly to creating or maintaining monopoly power." *Id.* Intending the natural consequences of acts that are lawful does not constitute the "exclusionary intent" required to find a § 2 violation. *Pacific Eng. and Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.), *cert. denied*, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977). To determine whether conduct

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[19] The Cities ask us to apply a procompetitive standard to establish legitimate business decisions. This is not the law. *See Olympia Equipment*, 797 F.2d at 375-76.

violates the antitrust laws we examine "its effect on competition, not its effect on an individual competitor." *Bright*, 824 F.2d at 824. "The Sherman Act 'does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 697 (10th Cir. 1989) (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826, 65 S.Ct. 1545, 1547, 89 L.Ed.2d 1954 (1945)), *cert. denied*, ___ U.S. ___, 111 S. Ct. 441, 112 L.Ed.2d 424 (1990).

A recent Seventh Circuit decision sheds light on the intent to monopolize analysis in the context of a natural gas pipeline dispute. *Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991). In *Panhandle*, the court found a monopolist pipeline's intent should be examined not as to

> "whether the firm intended to achieve or maintain a monopoly, but as to whether the underlying purpose of the firm's conduct was to enable the firm to compete more effectively. Did the firm engage in the challenged conduct for a legitimate business reason? Or was the firm's conduct designed solely to insulate the firm from competitive pressure?"

Id. at 1481. The court also said:

> [T]he intent relevant to a § 2 Sherman Act claim is only the intent to maintain or achieve monopoly power by *anticompetitive means*. Section 2 forbids not the intentional pursuit of monopoly power but the employment of unjustifiable means to gain that power. . . . The offense of monopolization requires proof of "conduct *designed* to maintain or enhance [monopoly power] *improperly*."

Id. (quoting *Olympia Equipment*, 797 F.2d at 373).

In *Panhandle*, the pipeline had full requirements contracts in force with its customers. To enable it to supply the customers' needs on demand the pipeline entered into long term supply contracts. When Congress deregulated prices, other suppliers without long term supply contracts could offer gas at a less expensive price. The pipeline's customers wanted to get out of their existing contracts so they could buy cheaper third party gas to be transported over the pipeline. The issue presented to the court was whether the pipeline's efforts to keep its contracts in place by denying its customers the right to purchase third party gas violated the antitrust laws. *Id.* at 1480. The court found the pipeline's concern over take-or-pay liability coupled with the regulatory turmoil in the natural gas industry at the relevant time were sufficient to negate the possibility the pipeline's conduct was motivated by an anticompetitive intent. *Id.* at 1480-89.

We find a similar situation before us in this case. The Cities proffered expert affidavits attempting to establish Williams' rationale for closing the pipeline. Even by viewing these statements in the Cities' favor, we conclude the affidavits present argument supporting a holding legitimate business concerns motivated Williams' conduct. The Cities argue Williams' low take-or-pay liability cannot be characterized as a legitimate business concern sufficient to justify closing the pipeline. Perhaps that argument would fly if that were the only evidence of concern, but evidence exists Williams also wanted to prevent conversion of sales service to transportation service. Consequently, we hold refusal to provide access can be justified by Williams' legitimate business concerns. *Id.* at 1485 (refusal justified where pipeline faced potential take-or-pay liability coupled with regulatory flux in the natural gas industry).

The undisputed evidence viewed in a light most favorable to the Cities shows Williams wanted to prevent take-or-pay liability, prevent conversion of sales services to transportation services, and enter into new contracts to

enable it to offer a permanent program. The Cities provided no evidence to raise a factual dispute whether Williams had a legitimate business reason for closing the pipeline. The Cities' own evidence shows Williams told them it believed the new contracts were necessary to implement the permanent program and Williams earned more from selling gas than transporting it. Presented with these facts and recognizing the regulatory turmoil present in the natural gas industry, a reasonable juror could only conclude Williams had a legitimate business reason for closing the pipeline. When such a business reason exists, no misuse of monopoly power can be shown. *See Aspen Skiing.*

The Cities misunderstand the relevance of regulatory turmoil in this context. The turmoil does not immunize Williams from the antitrust laws. Rather, the existence of regulatory turmoil strengthens the conclusion that Williams' conduct was motivated by legitimate business concerns, not an anticompetitive motive.

The Cities rely on *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), for the proposition an asserted business justification must be procompetitive to withstand judicial scrutiny. In *Otter Tail*, an electricity producer's refusal to transport electricity over its lines (wheeling) to towns with which its contracts had ended violated § 2 of the Sherman Act. A similar argument was raised in *Panhandle*, *Panhandle*, 935 F.2d at 1485. However, the *Panhandle* court found the existence of extant contracts with its natural gas customers distinguished the cases. Similarly, as noted above, we found the full requirements provision of the contracts to be in full force when the pipeline was closed. Furthermore, the Federal Power Commission did not have the authority to force Otter Tail to wheel electricity over its lines. *Otter Tail*, 410 U.S. at 375-76, 93 S.Ct. at 1028. Williams, on the other hand, was subject to FERC regulation that required it to provide a permanent program of third party gas transportation, and Williams was in the process of com-

plying with this regulation. Thus, we find *Otter Tail* is inapplicable to the facts of this case as some of the Cities had effective full requirements contracts with Williams and Williams was subject to regulations that required it to transport third party gas to the Cities.

VI. EXTENDED PERIOD DAMAGES

The Cities claim they are entitled to consequential damages covering the period August 1988 through August 1993 as part of their claim for extended period damages for the time Williams closed the pipeline to the transportation of third party gas. They presented evidence tending to show that if Williams had not closed the pipeline, the city of Cleveland would have received an increased discount on its existing natural gas contract with a third party supplier.

Williams moved for summary judgment asserting Cleveland had an enforceable contract to receive third party gas and in fact had received gas pursuant to that contract executed in 1986. The court granted Williams' motion against Cleveland finding the Cities did not produce plausible evidence to dispute Williams' claim. *Chanute II*, 1990-1 Trade Cas. ¶ 68,967 at 20. The Cities appeal and assert the court erred by denying extended period damages to Cleveland.

The record does not reflect Cleveland had begun any negotiations to receive an increased discount. The Cities' only evidence is an affidavit from Cleveland's supplier stating that if he entered into contracts with the other cities he would have increased Cleveland's discount to make them all comparable. Summary judgment is proper when the opposing party provides nothing more than speculation or suspicion. *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988).

VII. SEVENTH AMENDMENT CLAIM

The Cities assert that granting summary judgment on issues which involve a determination of reasonableness violates their Seventh Amendment right to a jury trial. The Supreme Court has found that summary judgment, applied properly, does not violate the Seventh Amendment. *Fidelity & Deposit Co. v. United States ex rel. Smoot*, 187 U.S. 315, 319-21, 23 S.Ct. 120, 121-22, 47 L.Ed. 194 (1902). The Supreme Court has also said:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968). The trial judge in this case applied the law to undisputed fact. We find this case is a proper one for summary judgment. Accordingly, the Cities' Seventh Amendment right was not violated.

VIII. TRANSITORY NATURE OF WILLIAMS' CONDUCT

In granting Williams' motion for summary judgment, the district court found Williams' conduct too transitory to support a claim for treble damages under the Clayton Act because the Cities extant contractual obligations were due to expire and the permanent program was implemented in July 1988. *Chanute II*, 1990-1 Trade Cas. ¶ 68,967 at 13. In further support of granting summary judgment as to Cities' remaining § 2 claims, the court reiterated its factual findings. *Chanute III*, 743 F. Supp. at 1460. The Cities argue the court's conclusion is clearly

erroneous and therefore summary judgment should be reversed. We need not reach the question of whether Williams' actions were transitory because we have disposed of all the Cities' claims on summary judgment on other grounds. The district court's conclusion Williams' conduct was transitory was only an alternative ground to his grant of summary judgment on other dispositive issues. He had already granted summary judgment and bolstered his decision by adding he found Williams' conduct transitory. We need not reach those alternative grounds on appeal.

IX. ATTORNEYS' FEES

The Cities moved for an extension of time to apply for attorneys' fees and costs pursuant to § 16 of the Clayton Act, which provides attorneys' fees for a plaintiff who substantially prevails in any action under this section. 15 U.S.C. § 26 (1988). The Cities theorize they "substantially prevailed" on their motion for preliminary injunction and thus are entitled to attorneys' fees. The district court granted the Cities' motion for preliminary injunction in *Chanute I*. This court stayed the injunction pending appeal and vacated the stay when the parties entered into a stipulation providing for the transportation of third party gas over Williams' pipeline. The Cities assert the terms of the stipulation are similar to relief requested in its preliminary injunction motion.

Williams counters the terms in the stipulation were not pursuant to the Cities' threatened litigation, but instead were suggested by separate FERC administrative proceedings.

The district court entered three orders in the matter. In its first Order, the court denied the Cities' motion for an extension of time to file for application of fees and costs. The court stated it was divested of jurisdiction because of the pending appeal on the merits of the case but would consider a motion for fees if we remanded the case

and the Cities prevailed. The Cities moved for a fee award nonetheless. In its second order, responding to the Cities' fee application, the district court again stayed determination of fees awaiting our decision in this matter. Finally, in its third Order, the court stated it was "not inclined to award attorney fees and costs to *any* litigant for simply prevailing at the time of hearing on injunctive relief." The court reiterated it would entertain attorneys' fees motions at the conclusion of the appeal. The Cities assert as error: (1) the court should have awarded attorneys' fees under § 16; (2) their fee application was timely; and (3) the court retained jurisdiction to determine a fee award.

Whether the district court retained jurisdiction over the award of attorneys' fees is a question of subject matter jurisdiction subject to de novo review on appeal. *See Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641 (10th Cir. 1990). The law is well settled the district judge retains jurisdiction over the issue of attorneys' fees even though an appeal on the merits of the case is pending. *Stewart v. Donges*, 915 F.2d 572, 575 n.3 (10th Cir. 1990); *Garcia v. Burlington Northern R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987); *Cox v. Flood*, 683 F.2d 330, 331 (10th Cir. 1982). Indeed, the trial court cannot make a determination of attorneys' fees until one party has prevailed. *Cox*, 683 F.2d at 331. Thus, the trial court retains jurisdiction to award attorneys' fees even though we have rendered our judgment in the case.

In its first motion, the court exercised jurisdiction by denying the Cities' motion for an extension of time to apply for costs. The court stated the Cities should have raised the issue earlier. The Cities filed an application for fees anyway, which the court received. The trial judge did not dismiss the application as untimely but rather stayed a determination of any fees until this court renders a decision on the merits of the case. The Cities' second claim of error is therefore moot.

We do not have jurisdiction to address the propriety of the Cities' first assertion. Only final decisions of the district court are appealable. 28 U.S.C. § 1291 (1988); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989). The district court's decision to stay determination of an award of attorneys' fees is not a final appealable order. Consequently, we must dismiss the Cities' appeal for lack of jurisdiction.

All orders of the trial court granting summary judgment are AFFIRMED and the Cities' appeal concerning attorneys' fees is DISMISSED.

SEYMOUR, Circuit Judge, concurring.

I, too, would affirm the judgment of the court below. I agree fully with parts I, II, V, VI, VII, VIII, and IX of the majority's opinion. I agree with the majority's conclusion in part III, although I would reach it for substantially different reasons as set out below. Finally, I agree with the portions of part IV that hold that Williams did not violate the antitrust laws. I would not reach the question of antitrust standing in this case. Because of the importance of the questions raised by this appeal, I feel compelled to write separately.

In part III, the majority relies on *McKenzie v. Mercy Hospital*, 854 F.2d 365 (10th Cir. 1988), to support its position that "a tying arrangement imposed by a single entity is not proscribed by § 1 of the Sherman Act." Majority opinion at page 650. This reliance is misplaced. Not only is *McKenzie* factually distinguishable,[1] and therefore not controlling, but under the law of this and other circuits, a buyer who alleges that he has been coerced or forced by a seller into an illegal tying arrangement has stated the requisite combination or conspiracy under section 1 of the Sherman Act. Here, the Cities allege that such forcing occurred and it is only because they have not stated facts from which the trier of fact could find forcing that summary judgment on this issue is appropriate.

The possibility of establishing a tying claim through forcing is well established in the case law. In *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 686 (10th Cir. 1984) (emphasis added), we stated:

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[1] *McKenzie* is distinguishable because in that case the plaintiff himself did not and could not agree to the illegal arrangement, nor did he allege that anyone else had done so. *Compare Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290, 1294 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073, 110 S.Ct. 1119, 107 L.Ed.2d 1026 (1990) (plaintiff refused to accede to defendant's forcing; court analyzed merits under theory that defendant induced plaintiff's competitors to accede).

> "Subsequent to [*United States v.*] *Parke Davis* [*and Company*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960)], the Supreme Court made it clear that a plaintiff who contends a seller has unlawfully used a refusal to deal as a means of enforcing an anticompetitive practice (*such as tying* or price-fixing) may establish the requisite combination or conspiracy in either of two ways: by showing that he himself *unwillingly complied* with the practice, or by showing that although he refused to acquiesce, other buyers agreed to the arrangement under threat of termination. *See Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 142, 88 S. Ct. 1981, 1986, 20 L.Ed.2d 982 (1968); *Albrecht v. Herald Co.*, 390 U.S. 145, 150 n.6, 88 S. Ct. 869, 872 n. 6, 19 L.Ed.2d 998 (1968). *See also, Yentsch v. Texaco, Inc.*, 630 F.2d 46, 51-52 (2d Cir. 1980); *Arnott v. American Oil Co.*, 609 F.2d 873, 885 (8th Cir. 1979), *cert. denied*, 446 U.S. 918, 100 S. Ct. 1852, 64 L.Ed.2d 272 (1980)."

We affirmed our holding on rehearing, where the defendant urged us to reconsider our conclusion that the record contained evidence of a tying conspiracy. We stated that "we do not construe *Monsanto*[*Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)] as a retreat from those cases holding that a combination occurs between a seller and buyers 'whose acquiescence in [the seller's] firmly enforced restraints was induced by "the communicated danger of termination."'" *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 732 F.2d 779, 780 (10th Cir.), *cert. denied*, 469 U.S. 854, 105 S.Ct. 178, 83 L.Ed.2d 113 (1984); *see also Smith Mach. Co.*, 878 F.2d at 1294-95; *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990), *cert. granted*, ___ U.S. ___, 111 S. Ct. 2823, 115 L.Ed.2d 994 (1991); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 669-70 (7th Cir. 1985),

cert. denied, 474 U.S. 1129, 106 S.Ct. 1659, 92 L.Ed.2d 201 (1986).

Here, the Cities allege that Williams illegally tied the purchase of natural gas to its transportation and that they were *forced* into accepting the arrangement because they had no alternative source. As the majority notes at page 649, Williams's gas was sold at FERC approved prices, and the Cities could have obtained cheaper third party gas throughout this period. For the same reasons Williams did not have an essential facility, it could not have forced the Cities to acquiesce. As a consequence, summary judgment on the tying claim was appropriate.

In part IV, the majority considers various other claimed violations raised by the Cities on appeal. To the extent that the section holds that there is no violation of the Sherman Act, I agree. As a consequence of holding that the antitrust laws were not violated, however, I would not reach the questions of antitrust standing and antitrust injury. Each of these related doctrines concerns the relation between the antitrust violation at issue and the injury suffered by the plaintiffs. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (direct purchaser limitation—standing is a question of remoteness); *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) (antitrust injury limitation—injury must be the kind the antitrust laws were intended to prevent).

The majority's discussion of *Central Nat'l Bank v. Rainbolt*, 720 F.2d 1183, 1187 (10th Cir. 1983), and *Axis, S.p.A. v. Micafil, Inc.*, 870 F.2d 1105, 1108-09 (6th Cir.), *cert. denied*, 493 U.S. 823, 110 S.Ct. 83, 107 L.Ed.2d 49 (1989), illustrates this problem. *See* maj. op. at 652-653. The focus in antitrust standing and injury cases is on the *relationship* between the antitrust violation and the injury asserted by the plaintiff. The first paragraph on page 653 of the majority's opinion makes precisely this point. The analysis

that follows does not, however, apply this principle. Rather, it holds that Williams did not violate the antitrust laws. *Id.* at 653. The question of the relationship between the asserted antitrust violations and alleged injury, the heart of the standing and antitrust injury cases, is not discussed by the majority. This is for a good reason; absent a violation there is no relationship to consider. As a result, the majority's conclusion that "the Cities have not established the first prong of the antitrust standing test—an antitrust injury," *id.* at 653, bears little relation to the analysis that it follows. The issues involved in a standing inquiry, nicely summarized in footnote 14 of the opinion, simply do not connect to the text's discussion of the Cities' antitrust claim.

The conclusion of section IV suggests that the Cities' claims fail under *Brunswick*, but the opinion draws on *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987), for its substantive holding. *Olympia* does not discuss antitrust standing at all; I am convinced that we should have followed suit. The majority could only justify its discussion had it assumed a violation of the antitrust laws and then considered the nature of the injury and the proximity between these plaintiffs and the violation.

Under those circumstances, it would have been impossible to hold that these plaintiffs either lacked antitrust standing or did not suffer antitrust injury. The Cities were direct purchasers, not barred by *Illinois Brick*. That doctrine would bar a suit initiated by customers of the City of Chanute, but has nothing to say about the legitimacy of this suit. Likewise, the doctrine articulated in *Brunswick* would not bar this suit; the type of injury alleged by the Cities is precisely the type of injury the antitrust laws were designed to prevent. The problem with Cities' suit is that Williams did not violate the antitrust laws. Absent

a violation, there can be no recovery under the Clayton Act. I would say no more than that.

The Cities alleged that Williams violated the antitrust laws. Such allegations are insufficient to withstand summary judgment if there are no facts that could support a finding of a violation. *See Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). There are no such facts here. As a consequence, I vote to affirm the decision of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 87-1463-K

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND,OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; and CITY OF OSAGE CITY, KANSAS,

Plaintiffs,

vs.

WILLIAMS NATURAL GAS COMPANY,

Defendant.

July 27, 1990

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

This is an antitrust case in which the plaintiffs (the Cities)[1] claim they are entitled to treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, because defendant Williams Natural Gas Co. (WNG or Williams)[2]

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[1] The original plaintiffs include the following cities: Chanute, Auburn, Garnett, Humboldt, Iola, Neodesha, and Osage City, Kansas, and Cleveland, Oklahoma.

[2] Williams Natural Gas Company's predecessor, Northwest Central Pipeline Corp.., will also be referred to herein as Williams or WNG—it is not necessary for the court to make a distinction between the two companies for any issue now before the court.

reversed its policy of interim open access. The Cities assert that Williams' conduct in closing its pipeline was an exercise of its monopoly power which injured the Cities by preventing them from receiving transportation of a long-term, dependable supply of low cost natural gas from a third party supplier over Williams' natural gas pipeline. This case is now before the court on motions by Williams for summary judgment on the Cities' remaining antitrust claims and to strike some of the Cities' affidavits filed in opposition to Williams' motion for summary judgment.

In its motion for summary judgment, Williams argues that the record in this case demonstrates WNG has not abused its monopoly power, that the Cities cannot prove their essential facility claim, and that since WNG had the right to sell gas under its FERC tariff and certificates, an exercise of that right is not actionable under the essential facilities doctrine. As a result, Williams argues that the Cities cannot establish a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, and thus, it is entitled to summary judgment pursuant to Fed.R.Civ.P. 56(d).

As is more fully developed herein, the court finds that Williams' motion to strike some of the Cities' affidavits should be denied in part and granted in part. In addition, the court finds that Williams' motion for summary judgment on the Cities' remaining antitrust claims should be granted.

The current motions are not ruled on from a clear slate. This case has already been before the court on two separate occasions for findings of fact and conclusions of law. *City of Chanute, Kan. v. Williams Natural Gas Co.*, 678 F.Supp. 1517 (D. Kan. 1988) (hereinafter, *Chanute I*); and *City of Chanute, et al. v. Williams Natural Gas Co.*, Case No. 87-1463-K 1990 WL 20019 (D. Kan. Feb. 19, 1990) (hereinafter, *Chanute II*). Since those cases have already set forth the factual background of this case, the court will not reiterate such for purposes of the present motions. The court will set forth a summary of the findings in those

cases, however, to clarify the context from which the present motions arise.

In *Chanute I* this court addressed the Cities' request for a preliminary injunction. In regard to the prerequisites for a preliminary injunction, the court found that the Cities had: (1) shown that they would suffer irreparable injury unless an injunction was issued, (2) proved that their threatened injury outweighed the damages which a preliminary injunction may cause to Williams, and (3) shown that issuing an injunction would not be adverse to the public interest. *Chanute I*, 678 F.Supp. at 1526-30. Since the first three prerequisites for a preliminary injunction were found to be present, the court applied a "lessened" burden of proof on the fourth requirement. *Chanute I*, 678 F.Supp. at 1525-26. In other words, the Cities were only required to prove that they had "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.*

With that standard in mind, the court addressed the merits of the Cities' claim that Williams' failure to open access to its pipeline to alternate suppliers of natural gas constituted an intentional monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The Cities sought to prove liability under Section 2 of the Sherman Act by utilizing the "essential facilities" or "bottleneck" doctrine. *Chanute I*, 678 F.Supp. at 1531. This court ultimately found that, as the facts then appeared before the court, and given the fact that the lesser standard was applicable, the Cities had sufficiently established the likelihood they would prevail on their essential facilities claim. *Id.* at 1534. As a result, it was determined that the Cities had established each of the necessary requirements for the issuance of a preliminary injunction.

In *Chanute II*, the court addressed Williams' three separate motions for partial summary judgment. In the first

motion, Williams argued that some of the Cities could not show they suffered an "antitrust injury" because of certain contractual obligations between such Cities and itself, and thus did not have standing to recover treble damages under Section 4 of the Clayton Act. 15 U.S.C. § 15. In its second motion, Williams sought a summary judgment on the Cities' tying claims brought pursuant to Section 1 of the Sherman Act. 15 U.S.C. § 1. In its third motion, Williams sought a summary judgment on the Cities' claims for "extended period damages" (consequential damages covering the period August, 1988 through August, 1993) included within the treble damages claim. *Chanute II*, slip op. at 2-3.

In *Chanute II*, the court granted Williams' first motion for summary judgment to the extent that such Cities were contractually obligated to purchase their gas requirements from Williams during the period Williams' pipeline was closed to transportation of third party gas. More specifically, the court found that the Cities of Auburn, Iola, and Osage City were contractually obligated to purchase their requirements from Williams during the entire closed period (August 1, 1987 through August 5, 1988), and that the Cities of Chanute, Neodesha, and Humboldt were contractually obligated to purchase their requirements from Williams prior to April 22, 1988. The court ultimately found that to the extent such contractual obligations were enforceable, such Cities could not have suffered any antitrust injury and thus lacked standing to recover treble damages under Section 4 of the Clayton Act. *Chanute II*, slip op. at 35.

The court also found that Williams' motions for summary judgment on the Cities' tying claims brought pursuant to Section 1 of the Sherman Act should be granted. *Chanute II*, slip op. at 41. However, the court denied in substantial part Williams' request for summary judgment on the Cities' claims for extended period damages. *Chanute II*, slip op. at 43.

As a result of such findings, only a few of the Cities' original claims remain. For instance, the claims of the Cities of Cleveland and Garnett remain to the extent those Cities can show they sustained injury as a result of an antitrust violation by Williams under Section 2 of the Sherman Act. In addition, the claims of the Cities of Chanute, Neodesha, and Humboldt remain only to the extent such Cities can show an antitrust violation by Williams under Section 2 of the Sherman Act which injured such Cities and occurred after April 22, 1988.[3]

In the January 29, 1990 oral arguments for *Chanute II*, the court noted the limited number of remaining claims and suggested that Williams stand ready to file a summary judgment motion on the remaining Sherman Act Section 2 claims after the court issued its findings of facts and conclusions of law in *Chanute II*. (Docket No. 248, pp. 73-74.) Since the essential facilities doctrine is a Sherman Act Section 2 claim, the court noted that such a motion would likely address the propriety of such doctrine. In addition, the court indicated that even though this court relied on the essential facilities doctrine for issuance of the temporary restraining order in *Chanute I*, to grant summary judgment now on such theory in favor of Williams would

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[3] The Cities assert that such a finding "is incorrect because five of the Cities were denied access to outside supplies of boiler fuel gas from Vesta/Edison by WNG's closing, since WNG's inconsistent contracts for such fuel had only 30-day terms." (WNG's Final Summ. Judg. Motion, Cities' Response Brief, p. 1, n. 2.) What claim such an assertion supports is left unclear by the Cities' brief. Furthermore, in the agreed pretrial order filed November 15, 1989, the Cities only request the court to find violations of Sections 1 and 2 of the Sherman Act and only request damages recoverable pursuant to Section 4 of the Clayton Act. (*See* Docket #209, pp. 2-4.) Since the general rule is that the pretrial order controls the subsequent course of action unless modified to prevent manifest injustice, and since no request to modify and the requisite circumstances have not been presented to the court, the Cities' claims are limited to those set forth in the agreed pretrial order. Fed.R.Civ.P. 16(e).

not necessarily be in conflict with *Chanute I*, given the fact that a different standard applied to granting a preliminary injunction and that the facts now appear much differently since the parties have had an opportunity to conduct extensive discovery. The court also noted that the extent of the regulatory turmoil and its effect on Williams' conduct is much clearer now than it was in *Chanute I*. (*See* Docket No. 248, pp. 74-76.)

In a telephone conference held on March 20, 1990, the court addressed the Cities' request for an interlocutory appeal from *Chanute II*. (Docket No. 256.) The parties were informed that the court agreed the Cities were deserving of an interlocutory appeal, but that the court faced a dilemma in currently granting such a request. The court felt that this whole case was deserving of timely review by the Tenth Circuit, including the Cities' essential facility claim as well as their other Sherman Act Section 2 claims. (*Id.* at 3.) However, if the court immediately granted the interlocutory appeal, it would lose jurisdiction and the Tenth Circuit would not have before it the remaining claims. (*Id.*) Thus, the court suggested it may be better to suspend the interlocutory appeal until after the court had ruled on Williams' current motion for summary judgment against the Cities' Sherman Act Section 2 claims. (*Id.* at 4.)

Counsel for Williams concurred that this was a sensible procedure and agreed not to argue that the Cities' appeal from *Chanute II* was untimely if the court allowed the Cities' request for an interlocutory appeal to be suspended until after the court ruled in this case. (Docket No. 256, p. 5.) Counsel for the Cities acknowledged that such a procedure would be beneficial if it would decrease the possibility of having to retry something, but then wanted to note to the court that they still believed, as more specifically set forth in the Cities' motion to reject defendant's fourth summary judgment motion filed March 20, 1990, that such motion by Williams should not be considered by

the court because it was untimely. Counsel for the Cities based his argument on this court's October 23, 1990 scheduling order, in which the court set December 1, 1990 as the final date for the filing of all summary judgment motions.

In response to such arguments, the court found that Williams' fourth summary judgment request was timely because the court had suggested its filing. (*Id.* at p. 10.) The court herein adopts such findings and further adds that it requested Williams to file its motion testing the propriety of all the Cities' claims because of recent developments in the case law which shed much light on the issue of the reasonableness of Williams' conduct in light of the regulatory turmoil which was present. *See State of Ill. ex. rel. Hartigan v. Panhandle Eastern Pipe Line*, 730 F.Supp. 826 (C.D. Ill. 1990) (hereinafter, *Panhandle*). In addition, allowing Williams to file its current summary judgment motion and suspending the Cities' request for interlocutory appeal until after the court has ruled on Williams' current motions serves the purpose of conservation of court resources.

For example, since the court has employed this procedure, the whole case will be appealable to the Tenth Circuit at the same time. Thus, if it is necessary to retry this case, the parties will have assurance that the case is being tried on the correct law. This rationale is especially compelling in a complicated antitrust case such as the present matter since it presents many novel questions. Thus, based on the above rationale, the court specifically finds that good cause has been shown for modifying its scheduling order. Fed.R.Civ.P. 16(b).

Standard of Review

Since the court in *Chanute II*, slip op. at 4-8, has already set forth the appropriate standard of review to be used in evaluating summary judgment motions in this case, the

court will not reiterate those principles but will adopt and use them to evaluate the present motion for summary judgment.

In announcing said standards in *Chanute II*, the court did not specifically address Williams' motion to strike plaintiffs' affidavits since the court felt the use of general standard of review principles was all that was necessary to establish the facts without a genuine material dispute. However, in the current motions before the court, Williams asks the court to more specifically address its second motion to strike plaintiffs' affidavits. Williams asserts that since *Chanute II* "will certainly be appealed to the Court of Appeals, it is essential that the record be clear as to those affidavits which are sufficient under Rule 56(e) to be considered by the Court." (WNG's Second Motion to Strike, Initial Brief, p. 2, n. 1.) As a result, the court will more specifically address Williams motions to strike herein.

In relevant part, Fed.R.Civ.P. 56(e) gives the following guidance for sufficient summary judgment affidavits:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits . . . must set forth specific facts showing that there is a genuine issue for trial.

See also, Conaway v. Smith, 853 F.2d 789, 792 (10th Cir. 1988).

A. The Expert Affidavits

Williams argues that the affidavits of Basil Copeland, Edgar H. Bernstein, and Jatinder Kumar fail to meet the

requirements of Rule 56(e) because such affidavits are not based on personal knowledge of the affiants nor do they contain admissible facts. The Cities respond that the information in the questioned affidavits would be admissible as expert opinions at trial under Fed. R. Evid. 702-705, and thus should be admissible to defeat a summary judgment motion.

The Tenth Circuit has recognized that an affidavit which fails to meet the requirements of Rule 56(e) is subject to a motion to strike. *Noblett v. General Electric Credit Corp.*, 400 F.2d 442 (10th Cir. 1968). However, the commentary on what Rule 56(e) requires in regard to an expert's affidavit has not been very clear.

For instance, some courts and commentators direct the court to consider the following in determining what is allowable in a summary judgment affidavit:

> It should be made clear that the policy of Rule 56(e) is to allow the affidavit to contain all evidentiary matter, which, if the affiant were in court and testifying on the witness stand, would be admissible as part of his testimony. This means that hearsay statements that would be admissible at the trial as exceptions to the hearsay rule may be contained in the affidavit; opinion testimony that would be admissible at the actual trial can be submitted in an affidavit; and relevant and material evidence that is not excluded by the parol evidence may be contained in the affidavit.

6 (Pt. 2) MOORE'S FEDERAL PRACTICE ¶ 56.22, pp. 56-752 - 56-754 (1988) (footnotes omitted). Since the Federal Rules of Evidence allow an expert to testify in the form of opinion (Rule 703) on an ultimate issue (Rule 704), and without prior disclosure of the facts or data underlying the expert's opinion (Rule 705), it has been argued that an expert should have an unfettered ability to set forth his opinions in affidavits, and that such is sufficient to

oppose a summary judgment motion. However, this is definitely not the governing rule.

The general rule for what a sufficient affidavit must contain has been eloquently set forth by Judge Kaufman in affirming a summary judgment motion:

> We admit to having been fascinated and intrigued by this tale, which could only be matched by an Ian Fleming novel. To avoid summary judgment, however, a plaintiff must do more than whet the curiosity of the court; he must support vague accusation and surmise with concrete particulars.
>
> . . . .
>
> . . . To prevent the exchange of affidavits on a motion for summary judgment from degenerating into mere elaboration of conclusory pleadings, Rule 56(e) requires "supporting and opposing affidavits (to) be made on personal knowledge (and to) set forth such facts as would be admissible in evidence." Applegate, however, has submitted an affidavit grounded on suspicion, and bound together with rumor and hearsay. He has provided the court with the characters and plot line for a novel of intrigue rather than the concrete particulars which would entitle him to a trial.

Applegate v. Top Associates, Inc., 425 F.2d 92, 96-97 (2d Cir. 1970).

The problem in regard to an expert's affidavit, however, is that the personal knowledge requirement in Fed.R.Civ.P. 56(e) seems out of place when applied to an expert affidavit at the summary judgment stage, because Fed.R.Evid. 702-705 allow an expert to testify at trial without a personal knowledge of the facts he is testifying about. Most courts which have considered this conflict instruct that two

considerations are to be kept in mind in evaluating the expert's affidavit. First, the court must determine whether the expert's opinion would be admissible at trial. Second, any admissible evidence in the affidavit must be examined to determine whether it presents a genuine issue of material fact to prevent summary judgment. *See Mid-State Fertilizer v. Exchange Nat. Bank*, 877 F.2d 1333, 1339-40 (7th Cir. 1989); and *Ackerman v. Schwarts*, 733 F.Supp. 1231, 1247 (N.D. Ind. 1989).

In determining whether an expert's opinion is admissible at trial, a court must consider the following: whether the person is competent to testify as an expert; whether such testimony would be helpful or assist the trier of fact in its determination or understanding of relevant issues; and whether the facts or data upon which the expert bases his opinion are the types of facts or data reasonably relied upon by experts in the particular field in forming opinions on the subject. Fed.R.Evid. 702, 703. *See also Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) (a key consideration for determining the admissibility of an expert opinion is whether it will aid the jury in its determination of critical issues in the case); *American Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985) ("Expert opinions ordinarily cannot be based upon the opinions of others whether those opinions are in evidence or not."); and *Ackerman*, 733 F.Supp. at 1247 (if the expert's competency to testify as an expert is sufficiently established, then his opinion would be potentially admissible at trial and should be considered for purposes of summary judgment).

However, to hold that an expert's affidavit presents some admissible evidence and is not subject to a motion to strike[4] is not to hold that the expert's affidavit is suf-

[4] Just because an affidavit presents some inadmissible evidence does not mean the entire affidavit is to be stricken. *United States v. Alessi*, 599 F.2d 513, 514-15 (2d Cir. 1979). A court is free to disregard the inadmissible parts and consider the rest of the affidavit. *Id.* at 515.

ficient to preclude summary judgment. *Mid-State Fertilizer*, 877 F.2d at 1339-40; and *Ackerman*, 733 F.Supp. at 1247. In other words, "[a]dmissibility does not imply utility." *Mid-State Fertilizer*, 877 F.2d at 1339.

The court in *Mid-State Fertilizer* said the following about the requirements for sufficient supporting or opposing affidavits of expert witnesses:

> They shall "set forth facts" and by implication in the case of experts (who are not "fact witnesses") a process of reasoning beginning from a firm foundation. "It will not do to say that it must all be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment." . . . An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.

877 F.2d at 1339 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 627 (1944) (Frankfurter J., dissenting)) (other citations omitted). *See also Dart Industries, Inc. v. Plunkett Co. of Oklahoma*, 704 F.2d 496, 498 (10th Cir. 1983) ("A party resisting a summary judgment motion must do more than make conclusory allegations, it 'must set forth specific facts showing a genuine issue for trial' "); *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("This court has consistently held that conclusory allegations without specific supporting facts have no probative value"); *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981) ("in the context of a motion for summary judgment, an expert must back up his opinion with specific facts"); and *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977) ("To hold that Rule 703 prevents a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out of the record than [the expert's] theoretical speculations would seriously undermine the policies of Rule 56").

In sum, to the extent an expert's affidavit contains inadmissible evidence, the affidavit is subject to a motion to strike and will not be considered for purposes of a summary judgment motion. If an affidavit presents an expert's opinion which is admissible in whole or in part, the court will consider such an affidavit to the extent it is admissible.[5]

It is important to remember, however, that once the moving party has met its initial burden,[6] a summary judgment motion is not precluded just because the nonmoving party has presented an expert's affidavit which contains some admissible evidence. For instance, a genuine issue of material fact cannot be shown from merely conclusory allegations. In order to be of any value to the judicial process at the summary judgment stage, an expert's opinion must, at a minimum, set forth "a process of reasoning beginning from a firm foundation." *Mid-State Fertilizer*, 877 F.2d at 1339. It is with these standards in mind that the court addresses Williams' motion to strike.

1. Affidavit of Basil L. Copeland, Jr.

In response to WNG's second motion to strike, the Cities assert that "[i]t is conceded by WNG that Mr. Copeland possesses the necessary qualifications to testify on the matters contained in his affidavit, and that his testimony will aid the trier-of-fact." (WNG's Second Motion to Strike,

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[5] An expert's opinion is admissible in trial so long as: (1) the expert is competent to testify as an expert; (2) the expert's testimony would be helpful or assist the trier of fact in its determination or understanding of the relevant issues; and (3) if the facts or data upon which the expert bases his opinion are the type of facts or data reasonably relied upon by experts in the particular field in forming opinions upon the subject. Fed.R.Evid. 702, 703.

[6] *See First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 289-90 (1968) (shows how the burden of producing the evidence shifts in an antitrust case when the moving party meets its initial burden).

Cities' Response Brief, p. 6.) In addition, Mr. Copeland, in his affidavit attached to the Cities' response to WNG's second motion to strike, alleges that he based his conclusions on the kind of information experts in his field would reasonably rely upon. (*Id.* at ¶ 12.) These assertions, if true, would meet the requirements of admissibility under Fed.R.Evid. 702 and 703.

Williams does not make any serious attempt to refute the above assertions of the Cities. Instead, Williams' main argument in support of its motion to strike is that Mr. Copeland's affidavits are primarily conclusory opinions and fail to meet the "specific facts" requirement of Fed.R.Civ.P. 56(e). However, those arguments address the question of whether such an affidavit creates a genuine issue of fact—not whether the affidavit is inadmissible and thus subject to a motion to strike.

Since the requisite facts to establish admissibility of Mr. Copeland's affidavit are essentially unrefuted, Williams' motion to strike Mr. Copeland's affidavit is denied. As to the issue of whether such affidavits are sufficient to create a genuine issue of material fact, the court notes that much of Mr. Copeland's affidavit addresses issues which are not relevant to the current motion for summary judgment and that the affidavit has many conclusory allegations which do not show the necessary "process of reasoning to form a firm foundation." *Mid-State Fertilizer*, 877 F.2d at 1339. However, this is not the place to address that issue. Such issue will be address by the court's findings of facts without a material dispute.

2. Affidavit of Edgar H. Bernstein

Williams argues that Mr. Bernstein's affidavit "should be stricken in its entirety because it is almost entirely legal argument and unsupported opinion, statements of fact that are not within his personal knowledge, mischaracterizations of evidence in the record, and statements of

hearsay evidence." (WNG's Second Motion to Strike, Initial Brief. p. 10.)

None of the above assertions challenge Mr. Bernstein's competency to testify as an expert or allege that he has relied on facts or data which a reasonable expert in the field would not rely on. In fact, the only assertion that could arguably support a finding that Mr. Bernstein's affidavit is inadmissible is the assertion that the affidavit is mainly a legal argument. That is, to the extent such affidavit is merely a legal argument, it would be inadmissible as being unhelpful and not assisting the finder of fact. *See Specht*, 853 F.2d at 808.

To the extent Mr. Bernstein's affidavit instructs on what this court has already found in this case or consists of legal arguments, the affidavit should be stricken. Such testimony would not be helpful to the trier of fact, and thus would be inadmissible.

However, since Williams arguably did raise the issues of whether WNG and the Cities were actually competitors and whether the fact that some of the Cities have access to local gas suppliers indicates the Cities could physically duplicate WNG's system,[7] Mr. Bernstein's affidavit may be helpful to the trier of fact for the determination of these issues. Thus, the court will disregard the inadmissible parts of the affidavit and consider the rest. *Alessi*, 599 F.2d at 515.

At this point, however, the court finds that a line by line determination of what is admissible would be a useless waste of the court's resources. The issue of what specifically is admissible and sufficiently established for purposes of this summary judgment motion will be adequately addressed by this court's findings of fact.

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[7] (*See* WNG's Final Summ. Judg. Motion, Initial Brief, p. 6, n. 6; and p. 10, n.8.)

3. Affidavit of Jatinder Kumar

The above rationale with regard to the affidavit of Mr. Bernstein is equally applicable to the affidavit of Mr. Kumar. That is, although the affidavit may contain some unhelpful legal argument, it also contains some evidence which would be admissible. Thus the court will consider Mr. Kumar's affidavit to the extent it is admissible.

For instance, Williams' brief at page 10, footnote 8, arguably does put at issue the question of whether the fact that a couple of the Cities are connected to a local gas supplier indicates the Cities could physically duplicate WNG's facility. Thus, Mr. Kumar's expert opinion evidence that no reliable local gas was available and that it would be uneconomical for any city to attempt to duplicate WNG's facility may assist the trier of fact.

However, the question of whether the admissible part of the affidavit is sufficient to raise an issue of material fact will be addressed by the hereinafter findings of fact and conclusions of law.

B. The Lay Witness Affidavits

Williams also argues that the affidavits of lay witnesses Robert Walker and Leo Edison should be stricken because such affidavits fail to meet the requirements of Fed.R.Civ.P. 56(e). Williams argues that the affidavits do not establish that they are based upon the personal knowledge of the affiants, contain admissible facts, and that the affiants are competent to testify to the matters contained in the affidavits as required by Rule 56(e). *See Citizens Environmental Council v. Volpe*, 484 F.2d 870, 873 (10th Cir. 1973) (generalized, conclusionary, and unsubstantiated affidavits are insufficient to create a genuine factual dispute; Rule 56(e) requires personalized affidavits to successfully oppose a summary judgment motion); *In Bowen Elec. Co. v. J.D. Hedin Constr. Co.*, 316 F.2d 362, 364 (D.C. Cir. 1963) (the affiant's competency must affirma-

tively appear); and *G.D. Searle & Co. v. Chas. Pfizer & Co.*, 231 F.2d 316, 318 (7th Cir. 1956) (the parts of an affidavit which do not meet the requirements of Rule 56(e) must be disregarded).

1. Robert Walker

Williams attacks Mr. Walker's competency to testify on behalf of all of the Cities. In their response, the Cities do not attempt to argue that Mr. Walker is competent to testify on the behalf of any city except Chanute (Williams does not dispute that Mr. Walker is competent to testify on the behalf of the City of Chanute). Thus, the court finds that Mr. Walker is only competent to testify on behalf of the City of Chanute. However, it must also be noted that the Cities only have to establish there is a genuine issue of material fact to prevent this summary judgment motion and that all reasonable factual inferences must be resolved in their favor. *E.g., Galindo v. Precision American Corp.*, 754 F.2d 1212, 1216 (5th Cir. 1985). Thus, if Mr. Walker's affidavit relates facts from his personal knowledge which raise a genuine issue of material fact in regard to Williams' conduct with the City of Chanute, such would also likely prevent summary judgment against the other Cities since a reasonable inference would be that such conduct applied to the other Cities as well.

Williams also asserts that Mr. Walker is not competent to give his opinions or interpretations of the intent of FERC in issuing its orders. In addition, Williams argues that Mr. Walker is not competent to give his opinion on WNG's intent behind its actions.

The Cities do not argue that Mr. Walker is an expert. Thus, if any opinion testimony is to be allowed in his affidavit it will have to be allowable under Fed.R.Evid. 701. The first requirement of Rule 701 is that the lay opinion or inference be "rationally based on the perception of the witness." Mr. Walker's affidavit does not detail how he formed these opinions. Thus, the court must conclude

that such opinions were not rationally based on his perceptions.

However, to the extent Mr. Walker's affidavit relates the type of gas the Cities needed and WNG's course of conduct under its existing contract, the court will assume such statements are based on his personal knowledge as City Manager of the City of Chanute. In addition, since party admissions are properly allowable in affidavit as an exception to hearsay, the court will allow Mr. Walker's affidavit to be considered to the extent it relates statements made to him by WNG personnel.

Therefore, to the extent that Mr. Walker's affidavit contains matters which do not fall into one of the above categories, the court finds either that such are not relevant to the issues before the court, do not relate facts from his personal knowledge, or are not facts on which he is competent to testify, and that such should be stricken from the record.

2. Affidavit of Leo Edison

Williams argues that the affidavit of Leo Edison is improper because it attempts to set forth factual disputes by contradicting his earlier deposition testimony. Williams cites four parts of Mr. Edison's affidavit as being directly contrary to his earlier deposition testimony.

The court will only disregard an affidavit submitted in opposition to a summary judgment motion that is contrary to prior sworn statements by the affiant if the subsequent contrary affidavit constitutes an attempt to create a sham factual issue. *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986). The *Franks* court also instructed that the following factors were relevant in the determination of a sham fact issue:

> [W]hether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his

> earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain.

796 F.2d at 1237.

In addition, a distinction must be drawn between discrepancies which create a "transparent sham" and discrepancies which merely go to the weight of the evidence—creating an issue of credibility. *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986).[8] One way to make such a distinction is by only disregarding an affidavit as a sham if the affiant's prior testimony gave "clear answers to unambiguous questions which negate the existence of any genuine issue of material fact, [and thereafter tries to] create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins and Assoc. v. U.S. Industries*, 736 F.2d 656, 657 (11th Cir. 1984). *See also Franks*, 796 F.2d at 1237 (in finding a sham factual issue the Tenth Circuit said "his affidavit makes no reference to his earlier contrary statements, and his earlier testimony is unequi-

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[8] The court in *Tippens*, 805 F.2d at 953-54, gave the following rationale for such a distinction:

> The purpose of summary judgment is to separate real, genuine issues from those which are formal or pretended. To allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses and would deprive the trier of fact of the traditional opportunity to determine which point in time and with which words the witness . . . was stating the truth. Variations in a witness's testimony and any failure of memory throughout the course of discovery create an issue of credibility as to which part of the testimony should be given the greatest weight if credited at all. Issues concerning the credibility of witnesses and weight of the evidence are questions of fact which require resolution by the trier of fact.

vocal"). Furthermore, the court must keep in mind that everything in the record must be considered together with the affidavit in question, and all doubts must be resolved in favor of the nonmoving party. *Tippens*, 805 F.2d at 954. It is with these factors in mind that the court addresses Williams' specific concerns.

Williams first asserts that Mr. Edison's statement at paragraph 2 of his affidavit, which states in reference to his November 1, 1988 contract with Vesta that he "concluded that the earlier [January 29, 1987] contract was not enforceable and mutually agreed with Vesta to the new contract," is contrary to the following previously given deposition testimony:

> Mr. Schmidt: Okay. And was there any sort of a writing that reflected the termination of this agreement and its replacement by a new agreement?
>
> Mr. Edison: No. I don't think the replacement agreement says that this contract is null and void. I think *this [January 29, 1987] contract still stands*; but, of course, we're using the terms and conditions of the replacement agreement at this time.
>
> Mr. Schmidt: Okay. So when you say this agreement, meaning Exhibit 10, still stands, do you mean it could be still in force and effect or—well, what do you mean?
>
> Mr. Edison: Well, let me put it this way. I think that *if I wanted to press the issue we could probably continue to operate under this [January 29, 1987] original agreement.*

WNG's First Motion to Strike, Initial Brief, p. 8) (emphasis original).

Although there are some discrepancies between the affidavit and the earlier deposition testimony, the deposition statements cannot be considered "clear answers to unambiguous questions" and "unequivocally" contrary to the affidavit statement. Mr. Edison's deposition testimony does not state that both parties agreed the January 29, 1987 contract controlled when the pipeline opened after July 22, 1988. Furthermore, it would be reasonable to infer that Mr. Edison intended his deposition testimony to mean that although he believed the January 29, 1987 contract had not been terminated, due to a substantial change in circumstances since the contract was entered into, such contract could only be enforced by litigation if a conflict arose, and that he believed he would win in such a case. If this was Mr. Edison's understanding, it would explain why he "mutually agreed with Vesta to the new contract"—to avoid litigation costs and in recognition that there had been a substantial change in circumstances. Thus, since the statement in the affidavit in question is not unequivocally contrary to Mr. Edison's earlier testimony, the court finds such is not a "transparent sham."

Williams next contends that Mr. Edison's statement in paragraph 3 of his affidavit (which states, "[a]t no time was there any intent or purpose of the 'agency' language of the contract to entitle the Cities to directly take gas at the price set in my wholesale acquisition contract with Vesta") is contradicted by the fact that he did not mention any intent or purpose for the agency language when responding to the question whether the "agency" provision of the contract was ever amended (his response was, "No, that hasn't been amended. I think this was some language that I think Vesta wanted, wanted in there.").

However, the court cannot find that Mr. Edison's affidavit is unequivocally contrary to his prior deposition testimony because he was not asked about the purpose or intent of the "agency" language. As a result, the referred

to statement in the affidavit is not a "transparent sham." Thus, the affidavit in question will not be stricken.

Williams also asserts that Mr. Edison's statement at paragraph 5 of his affidavit, that he purchased gas after July 22, 1988, for four of the Cities "not under the terms of my old Supply Agreement of January 29, 1987, but under a new interim agreement . . . ," is directly contrary to the following deposition testimony:

> Mr. Schmidt: Okay. So in August of '88 you purchased gas from Vesta for the four cities as to which you are a seller?
>
> Mr. Edison: Right.
>
> Mr. Schmidt: And since this contract wasn't in effect I assume those transactions occurred under Exhibit 10 [the January 29, 1987 contract]?
>
> Mr. Edison: That's correct.

(WNG's First Motion to Strike, Initial Brief, p. 9.)

Although this affidavit statement can be characterized as "unequivocally" contrary to prior testimony, and the prior testimony was "clear answers to unambiguous questions," the court believes, given the record in this case, that the discrepancy creates an issue of credibility which should go to the weight of the evidence and is up to the trier of fact to determine. Such a finding is supported by the fact that even if the court were to determine the affidavit statement is a "transparent sham," such a finding would be irrelevant since there is record support for the questioned affidavit statement. For instance, as this court stated in *Chanute I*, 678 F.Supp. at 1527, Mr. Tudor's testimony supports a finding that "the Cities' contracts with Vesta were effectively terminated when WNG closed its pipeline." Thus, since there is record support for the

statement at issue, the court finds that such statement should not be stricken.

Williams' final argument, that Edison's affidavit attempts to create sham factual issues, addresses Edison's affidavit statement that "[h]ad WNG not closed its line, it was my intention to offer the same 75[cent] savings to Cleveland to treat all four cities in a similar way." (Edison Aff. ¶ 6.) Williams argues that such statement is directly contrary to Edison's June 20, 1989 deposition testimony explaining the difference between the contract price of Cleveland and the other Cities without ever mentioning an intent to change Cleveland's contract price:

> Mr. Schmidt: All right. So you would have given Auburn, in June of 1987, a contract similar to Cleveland's, but at a better price?
>
> Mr. Edison: Right. Right. There's some differences in transport; and also Auburn was 100% contract.
>
> Mr. Schmidt: 100% meaning what?
>
> Mr. Edison: Total requirements contract. Where Cleveland's was a 50% contract.

(WNG's First Motion to Strike, Initial Brief, p. 9.)

The affidavit statement can fairly be said to be unequivocally contrary to the prior deposition testimony and that the deposition testimony is clear answers to unambiguous questions. If Edison intended to increase Cleveland's discount rate so that it was the same as the other Cities, then he would have surely stated such when asked if another city was to get a better price.

Furthermore, there is no record support for Edison's change of heart. As the court has previously found:

> Such a gratuitous modification of the contract by Edison is very unlikely considering Cleveland had

> a five-year contract at the $.50 Mcf rate. Consequently, the court finds such a claim by the plaintiff is implausible—simply makes no economic sense—and since the plaintiff has not come forward with more persuasive evidence to support this claim, Williams' motion against Cleveland for extended period damages is granted. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

Chanute II, slip op. at 42. Thus, since the affidavit statement at issue is unequivocally contrary to Edison's prior deposition testimony and there is no other record support for such statement, the court finds such statement should be stricken.

Findings of Fact

When all of the rhetoric from both sides is stripped away, it is clear that the primary issue this court must address is whether Williams' exercise of discretion in reversing its policy of interim open access (closing its pipeline to the transportation of third party gas) was anticompetitive conduct in violation of Section 2 of the Sherman Act, or whether such decision was a legitimate business decision, given the regulatory turmoil and chaotic conditions which existed in the natural gas industry at time.

A most impressive and persuasive detailed account of the relevant regulatory and economic history of the natural gas industry was set forth by Judge Mihm in *Panhandle*, 730 F.Supp. at 835-66. Furthermore, this court in *Chanute I*, 678 F.Supp. at 1519-25, and *Chanute II*, slip op. at 9-27, has also addressed some of the relevant regulatory and economic history. Thus, it is not necessary to reiterate such detail in the case at bar. However, since it may be helpful for an understanding of the present motion to set

forth a summary of such findings as they apply to the parties in the case at bar, the court will do so.

The Cities are municipalities which own their own natural gas distribution system, referred to as local distribution companies (LDCs). The LDCs purchase gas at wholesale and then resell it to residential, commercial and industrial customers in their area. WNG is engaged in the interstate sale and transportation of natural gas. Its primary customers are LDCs and industrial users. *Chanute I*, 678 F.Supp. at 1519.

The current regulatory scheme of the natural gas industry has it roots in the passage of the Natural Gas Act of 1938 (NGA), 15 U.S.C. § 717 *et seq.* The primary aim of the NGA has been to protect consumers from exploitation at the hands of natural gas companies. *FPC v. Hope Natural Gas Co*, 320 U.S. 591, 610 (1944). The NGA gave the Federal Power Commission (FPC) broad regulatory powers, including the power to set "just and reasonable" rates. *Id.* at 611-12. Since Williams is a "natural gas company" and engaged in the interstate sale and transportation of natural gas, it is subject to regulation by the Federal Energy Regulatory Commission (FERC or the Commission), the FPC's successor. 15 U.S.C. § 717.

The NGA allowed the FPC to set ceiling prices on interstate sales from natural gas producers to pipelines (the wellhead price) and to regulate the price pipelines could charge their downstream customers. *Transcontinental Gas Pipe Line v. Oil & Gas Bd.*, 474 U.S. 409, 420 (1986). In regulating the wellhead price, however, the FPC set the price below the market price. *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 768, 770 (D.C. Cir. 1985). As a result, a large discrepancy developed between the price of unregulated intrastate gas and the price for regulated interstate gas, causing producers of natural gas to withhold production from the interstate market. *Id.*

Furthermore, caused in part by NGA's regulation of wellhead prices, a serious natural gas shortage developed in the late 1960s and continued into the 1970s. *Chanute I*, 678 F.Supp. at 1522. As a result, not all of the LDCs' natural gas delivery demands were met. *Panhandle*, 730 F.Supp. at 836.

To increase the assurance that they would receive their delivery demands, many of the contracts entered into between LDCs and the interstate pipelines contained "best effort" or "full requirements" provisions. *See Panhandle*, 730 F.Supp. at 836. For instance, prior to December of 1986, all of the Cities had "full requirements" contracts with Williams. Such contracts required the Cities to purchase all of their requirements from Williams and required Williams to maintain sufficient gas reserves to meet those requirements. *Chanute I*, 678 F.Supp. at 1519. During the natural gas shortage years, the LDCs were very happy with this arrangement because it gave them a relatively high assurance they would receive their delivery demands. *See Panhandle*, 730 F.Supp. at 836.

In addition to the need to meet their contract obligations to the LDCs, the pipelines were encouraged by the commission to develop supply reserves and enter into long-term contracts with producers. *Chanute I*, 678 F.Supp. at 1523. Furthermore, due to the oil shortage and the tightly regulated price, the contracts between the producers and the pipelines often had nonprice incentives such as provisions which guaranteed the pipeline would "take" a certain amount of a well's "deliverability." *Panhandle*, 730 F.Supp. at 836.[9] If the pipeline did not take the guaranteed amount over a certain designated amount of time, it still

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[9] The court in *Panhandle*, 730 F.Supp. at 862, defines deliverability as "the ability of a well to produce gas into a pipeline under a certain set of conditions that are defined in the contract" and is "determined by actually testing flow of the wells."

was obligated to pay the producer for the full amount of gas it had guaranteed to take ("take-or-pay" liability). *Id.*[10]

During this time period, Williams acquired extensive new gas reserves from Amoco Production Company. *Chanute I*, 678 F.Supp. at 1523. Most of this gas contained high NGPA incentive prices and take-or-pay provisions. *Id.*; WNG's Final Summ. Judg. Motion, Reply Brief, Tab 3.

Motivated in part by the imbalance between supply and demand created by the NGA's artificial wellhead pricing scheme and in part by a conviction that gas production at the wellhead level was sufficiently competitive to remove regulation, in 1978 Congress enacted the Natural Gas Policy Act (NGPA), 15 U.S.C. § 3301 *et seq.* *Chanute I*, 678 F.Supp. at 1522. The NGPA substantially terminated the commission's authority to regulate the price natural gas producers could charge but continued the commission's pervasive regulatory authority over interstate pipelines. *Id.*[11]

By 1982, however, a combination of NGPA incentives for increased production, energy conservation, mild winters and lower prices of competing fuels such as petroleum caused an oversupply of natural gas. *Chanute I*, 678 F.Supp. at 1523. Nevertheless, due in substantial part to high take-or-pay terms, producers of natural gas continued to develop new supply sources of natural gas. *Id.* The result was a surplus of gas deliverability that could not be absorbed at current market prices. *Id.*

To get rid of some of their surplus gas, and as an alternative to selling their gas to the interstate pipeline

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[10] A pipeline's take-or-pay exposure can be figured by taking the difference between the total amount of the guarantee obligation and the amount of actual purchases multiplied by the contract price. *Panhandle*, 730 F.Supp. at 861.

[11] By deregulating the price which gas producers could charge, it was hoped that incentives for exploration and development of new supplies of natural gas would be increased. *Panhandle*,730 F.Supp. at 836-37.

gas companies, many natural gas producers sought open access or use of interstate pipelines for transportation of the surplus gas to end customers. *Id.* In addition, purchasers, such as the LDCs who had entered into long-term contracts when there was a natural gas shortage, wanted out of their contracts—they wanted to buy gas directly from the producers and have such gas transported over the pipelines in competition with the interstate pipeline owners. *Id.* Since granting open access to their pipelines would undoubtedly decrease their requirements for sales gas and thereby substantially increase their potential take-or-pay exposure, interstate pipeline owners did not want to open their pipelines up for transportation of third party gas. *Id.*; *Panhandle*, 730 F.Supp. at 861-62.

However, as the price of fuel oil decreased in the early 1980s, it became apparent to many interstate pipelines that their industrial customers could switch to alternate fuels if they became less expensive than natural gas. *Panhandle*, 730 F.Supp. at 848. Thus, several interstate pipelines initiated special types of marketing programs, some of which were approved by FERC. *Id.* at 848-54. The programs were either designed to give customers with the most sensitive demand (able to switch to alternative fuels the easiest) selective price cuts, or to allow such customers to receive transportation-only service without allowing customers such as LDCs, who could not easily switch (captive customers), open access. *Id.* Most of these programs were found to be anticompetitive and discriminatory, but they were allowed to continue until November 1, 1985—the time FERC was to announce its new rules for nondiscriminatory transportation services by interstate pipelines. *Id.* at 855. *See also Maryland People's Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985) (*MPC I*); *Maryland People's Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985) (*MPC II*); and *Maryland People's Counsel v. FERC*, 768 F.2d 450 (D.C. Cir. 1985) (*MPC III*).

In October, 1985, FERC issued Order No. 436. Many interstate pipelines opposed the order because they believed it failed to deal with take-or-pay problems. *See Panhandle*, 730 F.Supp. at 855. In relevant part, Order No. 436 requires that if an interstate pipeline holds itself out as a natural gas transporter, then the pipeline's LDCs must have the opportunity to convert their existing contract demands from obligations to purchase gas to obligations to use (or pay for) transportation services. *Chanute I*, 678 F.Supp. at 1523.

Even though it may have opposed the issuance of Order No. 436, Williams attempted to comply with the order by filing with FERC in July, 1986 an Order 436 Stipulation and Agreement (S&A) which detailed Williams' plans for a permanent open-access program. *Id.* at 1524. However, since it took FERC a lot of time to process the proposed S&A, in August of 1986 Williams sought, pursuant to Section 311 of the NGPA, a temporary waiver of 18 C.F.R. § 284.10[12] and its full requirements contract provisions with the Cities. *See Chanute II*, slip op. at 16-17.

On September 29, 1986, FERC granted Williams' request for a temporary waiver of 18 C.F.R. § 284.10 and gave Williams the authority to waive its full requirements provision. *Id.* at 19-25. As a result, Williams commenced interim open access on December 23, 1986. *Chanute I*, 678 F.Supp. at 1524.

After making substantial changes to Williams' proposed permanent open-access plan, including provisions which would have given Williams some take-or-pay protection, FERC on February 20, 1987, approved Williams' S&A. *Id.*; WNG's Final Summ. Judg. Motion, Initial Brief, Tabs 1 and 2. Williams felt the alterations made to its S&A,

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[12] Required interstate pipelines to offer firm sales customers the option to convert their firm sales obligations into an equal amount of firm transportation service.

especially the ones eliminating its proposed take-or-pay protection, were unacceptable. *Id.* As a result, it refused to agree to such alterations.

By April of 1987, many of Williams' customers had taken advantage of the interim open access and were buying cheaper natural gas from producers. *Chanute I*, 678 F.Supp. at 1520. As a result, much of Williams' system supply was converted from sales service to transportation service, dramatically increasing Williams' take-or-pay exposure. *Id.* However, until August 1, 1987, Williams had been able to negotiate for take-or-pay relief with its producers (primarily Amoco Oil Company). *Id.*[13]

Since Williams could no longer negotiate for take-or-pay relief from Amoco, and since it did not yet have a permanent open access plan which factored in take-or-pay relief, on August 1, 1987, Williams decided it must reverse its policy of interim open access. *Id.* at 1521. Even though this decision required the Cities to purchase Williams' higher priced sales gas, it has now been established by Williams that such was a reasonable business decision considering the regulatory turmoil and the potential take-or-pay exposure it was facing. (WNG's Final Summ. Judg. Motion, Initial Brief, Tab 1, pp. 879-81; Tab 2, pp. 1220-21.)

Such a finding is also supported by the fact that Judge Mihm in *Panhandle* found the following:

> Because of the chaos in the marketplace, and the uncertainty regarding the ultimate shape of

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[13] The court notes that the Cities allege in their response brief to WNG's final summary judgment motion, p. 6, that "WNG made the choice to not obtain take-or-pay waivers from its principal supplier, Amoco Production Company ("Amoco") after July 30, 1987." The Cities cite no record support for this allegation. Furthermore, there is record support for the contrary assertion—that WNG pursued take-or-pay relief but that Amoco was not willing to give such relief after July 30, 1987. (WNG's Final Summ. Judg. Motion, Reply Brief, Tab 3.)

> new regulations by FERC, it was not unreasonable for Panhandle not to do any more than it did regarding negotiation of a tariff substitute for the G tariff. . . .
>
> . . . .
>
> In addition, Panhandle's take-or-pay exposure provided a legitimate business rationale for Panhandle's refusal to modify the G Tariff.

730 F.Supp. at 886. Furthermore, a finding that WNG's decision to reverse its interim open-access policy was a reasonable business decision given the conditions Williams was facing is even more compelling than was such a finding in *Panhandle*.

For instance, the pipeline in *Panhandle* did not allow the LDCs to receive any transportation gas during the time in question. 730 F.Supp. at 856-58. In contrast, WNG did attempt to meet the LDCs' demands by granting interim open access. Furthermore, there was evidence in *Panhandle* that the pipeline did discriminate against some of its customers by dividing its gas market into classes. *Id.* One class was the LDCs (captive customers) and the other class was industrial customers. The pipeline in *Panhandle* did not allow its captive customers to receive transportation gas but did allow some industrial customers to receive transportation-only service under certain conditions. *Panhandle*, 730 F.Supp. at 848, 888-94. There is no such evidence of discrimination in the case at bar. Moreover, the record shows that WNG at all times was not in any way discriminatory. For instance, when WNG opened its pipeline to interim open access, it opened the line for all users. Likewise, when WNG ended its policy of interim open access, it treated all users the same.

The Cities' primary argument in opposition to a finding that WNG's decision to reverse its policy of interim open access was reasonable given the circumstances of this case

is that there is factual support for a finding that WNG intentionally refused to transport gas for the Cities in an effort to force the Cities into purchasing all of their gas from Williams at WNG's higher sales prices and also to force the Cities into entering new contracts requiring the Cities over the next five years to purchase a substantial amount of their gas supplies from WNG at its higher sales prices. (WNG's Final Summ. Judg. Motion, Cities' Response Brief, pp. 2-3). However, the only record support cited is the conclusory opinions of some experts. Such is not sufficient to withstand the properly supported summary judgment motion of Williams. *E.g.*, *Mid-State Fertilizer*, 877 F.2d at 1339; and *Dart Industries, Inc.*, 704 F.2d at 498.

The Cities also argue such was not a reasonable business decision because Williams was not facing significant exposure to take-or-pay liability at the time it ended its interim open access. (WNG's Final Summ. Judg. Motion, Cities' Response Brief, pp. 6-7.) Such an argument is simply without merit. As the *Panhandle* court said:

> The Plaintiff's position, that take-or-pay was not a problem, simply lacks credibility. It is an argument easily made because, in making it, it naturally follows from Plaintiff's point of view that there would have been no significant adverse consequences for Panhandle if it had surrendered to demands to let G tariff LDC's transport non-Panhandle gas. Such is not the case. This situation was not, and is not, a Panhandle/CILCO problem, unique to their tariff and service contract relationship. It was and is an industry-wide problem, not best dealt with by an application of the antitrust laws as if we were dealing with a free market situation.

730 F.Supp. at 917.

Moreover, the Cities' argument misses the point. It is the *potential seriousness* of the take-or-pay exposure which provides Williams with a legitimate business rationale for reversing its policy of interim open access. *Panhandle*, 730 F.Supp. at 888.

The Cities do not dispute a projection as of July, 1987 by a Williams employee that WNG's potential take-or-pay liability would have increased by at least $7.2 to 13.5 million if interim open access was continued for the next three months—through October, 1987. (WNG's Final Summ. Judg. Motion, Cities' Response Brief, p. 7.) In addition, attached to an affidavit of one of the Cities' experts is a report by the American Gas Association assessing the take-or-pay liability of the major interstate pipelines as of March 31, 1987. In regard to WNG's take-or-pay liability, the report states at Table 1 the following:

> Unresolved claims for gas purchase deficiencies aggregating approximately $50 million have been received. Other claims may be forthcoming for prior years as well as for contract years ending in 1987. Amounts which may be claimed by producers in excess of the amounts paid through March 31, 1987 could exceed $100 million.

(WNG's Final Summ. Judg. Motion, Cities' Response Brief, Tab 4.)[14]

Thus, if the court were to accept the Cities' argument, it would have to find that a business decision intended to mitigate a problem which had already created a potential

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[14] The court notes that there is much record support for a finding that WNG's *potential* take-or-pay liability was actually much greater. For instance, WNG brought to the attention of the court at oral arguments on the current motions that in a case now pending in the Superior Court of the State of Delaware, New Castle County, Amoco Production Company has asserted a counterclaim for take-or-pay damages in the amount of $203 million against WNG.

$100 million liability, and which was projected to create at least a $7.2 to 13.5 million liability over the next three months, was an unjustifiable overreaction, and that no serious need for action existed. That, the court, as a matter of law, cannot do. The court finds the Cities' argument is simply implausible (makes no economic sense), and since the Cities have not come forward with more persuasive evidence to support this claim, it cannot prevent Williams' summary judgment motion. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

Furthermore, it cannot be disputed that Williams made its decision to end its program of interim open access in the midst of unparalleled regulatory uncertainty and turmoil. For instance, as the court has already indicated, FERC's allowance of special marketing programs designed to allow interstate pipelines to transport cheaper gas to customers most able to switch to alternative fuels was reversed by *MPC I*, *MPC II*, and *MPC III*. Furthermore, in *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1023-30 (D.C. Cir. 1987), *cert. denied*, 99 L.Ed.2d 698 (1988) (AGD), the court affirmed in substantial part Order No. 436, but remanded significant portions of the order for failure to adequately deal with take-or-pay concerns. In response to such direction by the court, FERC issued on August 7, 1987 (just a few days after WNG suspended its interim open-access program) Order No. 500 in an attempt to address some of the take-or-pay concerns on an interim basis. However, even this interim order was remanded to FERC for, among other reasons, failure to adequately explain its reasoning, failure to adequately deal with the take-or-pay problem, and failure to comply with the mandate of *AGD*. *American Gas Ass'nv. FERC*, 888 F.2d 136 (D.C. Cir. 1989). *See also Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989) (striking

down one of FERC's take-or-pay allocation methods and the promulgation of FERC Order No. 500-H).[15]

It must also be noted that on June 6, 1986 FERC issued Order No. 451. How Order No. 451 works and its application to this case has already been addressed by this court and that ruling is herein adopted. *Chanute I*, 678 F.Supp. 1524-25; and *Chanute II*, slip op. at 38-41. Reference to Order No. 451 at this point, however, is merely made to note that the Fifth Circuit has recently held that FERC exceeded its congressional authority by issuing Order Nos. 451 and 451-A. *Mobil Oil v. FERC*, 885 F.2d 209 (5th Cir. 1989), *stay granted*, 110 S.Ct 830 (1990), *cert. denied*, 110 S.Ct. 2585 (1990). Thus, such orders were vacated but are currently still in effect pending decision on a petition for certiorari to the Supreme Court filed on March 15, 1990. It should also be noted that one of the reasons cited by the Fifth Circuit for vacating Order No. 451 was that "the prospect for exacerbating the take or pay problem runs rampant throughout the provisions of Order No. 451." *Id.* at 224.[16]

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[15] Order No. 500-H was not issued as a "final" order until December 31, 1989, and Order No. 500-I was issued on February 12, 1990. Those orders are still on appeal and thus, may be further modified.

[16] The regulatory uncertainty and turmoil WNG was facing is also shown by *Martin Exploration Mgt Co. v. FERC*, 813 F.2d 1059 (10th Cir. 1987), *rev'd*, 486 U.S. 204 (1988). In that case the Tenth Circuit rejected a FERC ruling interpreting NGPA §§ 121 and 101(b)(5) to mean that any gas that qualified for both deregulated and regulated treatment would be treated as deregulated, and also rejected the commission's ruling that certain "new tight formation gas" was subject to regulation under NGPA §107(c)(5) and thus automatically qualified for deregulation as new gas under NGPA §§ 102 or 103. The Tenth Circuit based its rejection of FERC's position primarily on a finding that NGPA § 101(b)(5) unambiguously required that the applicable category (deregulated versus regulated) be that which, at any particular moment, resulted in the gas producer receiving the highest contract price for its gas. 813 F.2d at 1069. However, in reversing the Tenth Circuit's findings, the Supreme Court found ample support for FERC's findings.

Throughout this regulatory turmoil, FERC has consistently been chided for either its indifference to or its inadequacy in addressing the take-or-pay problem. *E.g.*, *Consolidated Edison Co. Of New York, Inc. v. FERC*, 823 F.2d 630, 641-42 (D.C. Cir. 1987). Thus, it is clear that due to the regulatory uncertainty and turmoil the take-or-pay problem is not, and never was, only a problem between the Cities and Williams. "It was and is an industry-wide problem, not best dealt with by an application of the antitrust laws as if we were dealing with a free market situation." *Panhandle*, 730 F.Supp. at 917.

Furthermore, it must also be noted that the Cities have not presented any evidence which could be construed as indicating Williams had the specific intent to monopolize or further its monopoly power. Moreover, the evidence overwhelmingly compels the contrary conclusion.

For instance, in addition to the already mentioned evidence which shows Williams' conduct was motivated by reasonable business decision justifications, the record, after extensive discovery conducted by both parties, now indicates that Williams was diligent in pursuing a solution which would allow for permanent open access while affording it some take-or-pay protection. Soon after Williams refused to agree to the changes made to its original S&A in FERC's February 20, 1987 approval of such S&A, Wil-

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FERC v. Martin Exploration Mgt. Co., 468 U.S. 204 (1988).

Regulatory uncertainty is also shown by the fact that the court in *Williams Natural Gas Co. v. FERC*, 872 F.2d 438 (D.C. Cir. 1989) held that FERC had failed to provide adequate reasoning or explanation for its termination of ongoing rule-making proceedings concerning the elimination of the tight sands gas incentive price under NGPA § 107(c)(5), and thus remanded the case to FERC for such consideration. FERC did subsequently eliminate the incentive price under NGPA § 107(c)(5), and thus remanded the case to FERC for such consideration. FERC did subsequently eliminate the incentive price. Limitation on Incentive Prices for High-Cost Gas to Commodity Values, 55 Fed. Reg. 6367 (Feb. 23, 1990)).

liams began preparations to submit a Revised Stipulation and Agreement (RS&A).

On January 4, 1988, Williams submitted its RS&A to FERC for approval. FERC approved the RS&A by a final order issued on July 5, 1988, 43 F.E.R.C. (CCH) ¶ 61,227 (1988), and WNG's revised tariff was accepted on July 19, 1988, 44 F.E.R.C. (CCH) ¶ 61,145 (1988). Williams accepted the NGA § 7 certificate on July 20, 1988, thus enabling it to begin providing permanent nondiscriminatory open-access transportation services.[17]

Conclusions of Law

It is a well settled rule that in order to establish the offense of monopolization in violation of Section 2 of the Sherman Act the following two elements must be shown:

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[17] The court notes that throughout these summary judgment motions the parties have disputed whether it was the July 22, 1988 stipulation before the Tenth Circuit or FERC's granting and Williams' acceptance of an NGA § 7 certificate which provided the Cities with open access to Williams' pipeline. This issue is irrelevant to any issue now before the court and is not properly before the court for purposes of the summary judgment motion.

The court does note, however, that contrary to Williams' assertion, the court has not ruled on this matter. At the January 18, 1989 status conference referred to by Williams (Reply Brief, pp. 4-5 and Tab 4), all the court did was acknowledge that Williams does now have in place an NGA § 7 permanent open-access certificate. This is not in any way contrary to this court's and FERC's earlier position that Williams had the authority under NGPA § 311, during the period it closed its pipeline to interim open access, to reverse that policy and once again provide interim open access transportation. *See Chanute II*, slip op. at 24-25; and *Williams Natural Gas Company*, Docket No CP88-229-000, 42 F.E.R.C. ¶ 61,189, pp. 61,667-8 (Feb. 19, 1988). However, the court also notes that what the Cities were really wanting was permanent open access which could only be provided by the issuance of an NGA § 7 certificate since such would require the abandonment of services. In any event the resolution of this issue is not properly before the court.

> (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); *see also Bright v. Moss Ambulance Service*, 824 F.2d 819, 823 (10th Cir. 1987); and *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985).

The first step in evaluating an alleged monopolization claim is to define the relevant markets. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268 (2d Cir. 1979). This step is further broken down into a determination of the relevant product market and the relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). In *Chanute I*, this court found the relevant product market to be natural gas and the relevant geographic market to be the area encompassing the plaintiff Cities. 678 F.2d at 1532.

The court's definition of the relevant geographic market is not questioned by either party for purposes of these summary judgment motions and will thus be adopted herein. However, the Cities argue that the relevant product market ought to be narrowed from the court's earlier findings to include only "transportation of firm requirements gas at reasonable rates under long-term contracts, upon which the Cities could rely for firm service for their distribution systems" (hereinafter, "firm requirements transportation gas"). (WNG's Final Summ. Judg. Motion, Cities' Response Brief, p. 3.)

The Supreme Court has said that the primary consideration in determining the relevant market is to find those commodities which are "reasonably interchangeable by consumers for the same purposes—price, use and qualities

considered." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). The Tenth Circuit has interpreted this rule as requiring the court to look "to the ready availability of substitutable products." *Bd. of Reg. of U.of Okl. of NCAA*, 707 F.2d 1147, 1158 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984). Furthermore, the Tenth Circuit has also held that as a matter of law the trial court must not exclude from the relevant product market definition products which vigorously compete with the product defined by trial court—have a cross-elasticity of demand which is likely to be extremely elastic. *Westman Com'n Co. v. Hobart Intern., Inc.*, 796 F.2d 1216, 1221 (10th Cir. 1986); *see also, Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 919 (10th Cir. 1975), *cert dismissed*, 423 U.S. 802 (1975) (held the trial court's narrow definition of the relevant product market was plain error in light of the evidence of cross-elasticity and interchangeable quality of the products).

Based on these directives, the court must find the Cities' asserted definition of the relevant product market is incorrect as a matter of law. The first reason the court must reject the Cities' definition of the relevant product market is because it focuses on what the Cities wanted, not what was "reasonably interchangeable by *consumers* for the same purposes." *E. I. du Pont de Nemours & Co.*, 351 U.S. at 395 (emphasis added). Since the Cities are essentially a "purchasing agent on behalf of the ultimate end-user customer," the demand characteristics of the ultimate end-use consumer must be considered in the determination of the relevant market. *Panhandle*, 730 F. Supp. at 866.

Secondly, the Cities have not presented any evidence that consumers could not or would not use Order 451 gas or gas other than firm requirements transportation gas if such gas was available at relatively less expensive rates. Furthermore, the record of this case would indicate the contrary conclusion is compelled. As the court has more

specifically set forth in its findings of fact, this lawsuit arose out of the fact that, because of unforeseeable regulatory and economic factors, the wellhead price of natural gas became relatively less expensive than WNG sales gas and consumers wanted access to that relatively cheaper gas. Thus, the Cities' argument that the relevant market is limited to one narrow segment of the natural gas market is directly contrary to the very reason this lawsuit came into being in the first place.

Finally, the Cities' narrow definition of the relevant product market simply does not make any sense. Contracts for the sale of the same commodity often vary with respect to price, volume, and term. However, that does not mean that a separate market is established for each contract of the same commodity merely because that contract has different terms. Thus, since neither party has presented sufficient evidence for the court to question its earlier findings in regard to the relevant product market, the court will reaffirm its earlier finding that the relevant product market is natural gas. *Chanute I*, 678 F.2d at 1532.[18]

Monopoly power is defined in this circuit as requiring "proof of *both* power to control prices and power to exclude competition." *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 967 (10th Cir. 1990) (emphasis original). Since Williams does not dispute for purposes of this summary judgment motion that it has monopoly power,

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[18] The court notes that there is some support for a more broadly defined product market. In *Panhandle*, 730 F. Supp. at 900, the court recognized that industrial end users could easily switch to alternative fuels if natural gas prices were uncompetitive. In addition, since one of the Cities' experts alleges that "[r]esidential consumers shift to electric space heating," the relevant product market probably ought to include the consumer's ability to conserve natural gas (*Panhandle*, 730 F.Supp. at 868-69) or switch to electric heat within the relevant product market. However, since WNG failed to argue for a broader product market definition, the court will apply the product market used in *Chanute I*.

the court will herein assume Williams does have such power. (WNG Final Summ. Judg. Motion, Reply Brief, p. 8, n. 6.)

A. Intent to Monopolize Claim

The mere existence of monopoly power, however, does not establish a violation of the Sherman Act. Rather, "[t]he offense of monopolization under Section 2 of the Sherman Act requires proof of monopoly power . . . plus conduct designed to maintain or enhance that power improperly." *Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 373 (7th Cir. 1986) (citing *Grinnell*, 384 U.S at 570-71, and *Aspen*, 472 U.S. at 596, n. 19).

Moreover, in determining whether the second *Grinnell* requirement is satisfied,[19] at a minimum a general intent to monopolize is necessary to establish a Section 2 Sherman Act claim. *Aspen*, 472 U.S. at 602. It has been said in the context of a non-regulated business that if a dominant firm's conduct leads to "the acquisition or maintenance of monopoly power," then the requisite willful monopolistic intent is presumed. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1108 (7th Cir. 1983).

However, in the case of a regulated utility, that same case gives the following guidance:

> "In the particular circumstances of a regulated utility . . . entitled to recover its cost of services and provide its investors with a reasonable rate of return, we believe that something more than general intent should be required to establish a Sherman Act violation." *See also* Watson & Brunner, [*Monopolization by Regulated "Monopolies"*:

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[19] That is, "the willful acquisition or maintenance of that [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell*, 384 U.S. at 570-71.

> *The Search for Substantive Standards*, 22 Antitrust Bull. 559], at 574-79 [(1977)] (willfulness by a regulated monopoly should be demonstrable only by evidence of predatory conduct or other exclusionary acts contrary to public policy). We reaffirm our holding in *Mishawaka* and, therefore, reject MCI's contention . . . that the trial court erred in requiring MCI to prove that each allegedly anticompetitive act or practice attributed to AT & T was done with the intent to maintain a monopoly in the relevant market.

MCI Communications, 708 F.2d at 1108 (quoting *Mishawaka v. American Electric Power Co.*, 616 F.2d 976, 985 (7th Cir. 1980). The *Panhandle* court interpreted this to require that a regulated utility, such as an interstate pipeline, must be shown to have a " 'specific intent to monopolize,' namely, an intent to actually control prices or exclude competition, i.e., to seize or hold monopoly power." 730 F.Supp. at 910.

Moreover, some recent cases have emphasized, by finding as a matter of law, that even relatively clear proof of monopolistic intent, such as "the desire to crush a competitor, standing alone," does not violate Section 2 of the Sherman Act if a valid business justification for the conduct in question is offered and is not sufficiently refuted. *Ocean State Physicians Health Plan, Inc. v. Blue cross*, 883 F.2d 1101, 1113 (1st Cir. 1989).[20] *See also Reazin v.*

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[20] What is a sufficient business justification is an appropriate matter to consider at the summary judgment stage. *See Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1185 (5th Cir. 1988) (although the court ultimately found there was a triable issue of fact in the Sherman Act Section 2 case before it, the court noted: "Defendants can offer business justifications for the refusal to deal. If the justifications are supported by legitimate business concerns . . . then the district court may decide as a matter of law that the defendant's refusal '"was actuated by innocent motives rather than by an intention and desire to perpetuate a mo-

Blue Cross & Blue Shield of Kansas, Inc., 663 F.Supp. 1360, 1486-87 (D. Kan. 1987), *aff'd*, 899 F.2d 951 (10th Cir. 1990) (this court granted summary judgment on counterclaims under §§ 1 and 2 of the Sherman Act, in part, because evidence of legitimate business reasons for the counterclaim defendant's conduct was not sufficiently refuted).

Furthermore, a monopolist is not required to enter into business transactions without considering how such transactions might affect the monopolist's business. For instance, the Supreme Court in *Aspen* approved the following instruction given by the district court in that case:

> "[A] company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.
>
> "In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law."

472 U.S. at 597 (quoting from court's instructions). In *Aspen*, the court found that a jury could have reasonably found that the defendant "elected to forgo [sic] . . . short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." 472 U.S. at 608.

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nopoly' "); and *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983) (in affirming the district court's granting of summary judgment in favor of the defendant in a suit based on both Sherman Act and Clayton Act claims, the court said that since the record evidence showed that the defendant's refusal to extend credit to the plaintiff was based upon valid business considerations, no Clayton Act violation could be found).

This principle was stated by the *Panhandle* court as follows:

> Just as other firms generally may refuse to deal with another party without violating antitrust laws, *Becker v. Egypt News Co.*, 713 F.2d 363, 366 (8th Cir. 1983), a firm having an otherwise lawful monopoly has no duty to deal with a competitor, reduce prices or help new entrants in the market. *Olympia Equipment Leasing*, 797 F.2d at 376. Antitrust liability lies only if business reasons are merely a pretext for anticompetitive behavior; no liability attaches where the firm has valid business reasons for its activities. *Becker*, 713 F.2d at 370.

730 F.Supp. at 908. *See also United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 612, n. 1 (1977) ("normal business goals, not forbidden by § 2 without other evidence of intent to monopolize"); and *Southern Pacific Communications v. A T & T*, 740 F.2d 980, 1009-10 (D.C. Cir. 1984) (a denial of access to an essential facility may not violate the antitrust laws if the alleged anticompetitive conduct was reasonable and done in good faith pursuant to regulatory obligations).

Thus, to establish in the case at bar whether or not Williams' decision to reverse its policy of interim open access violated Section 2 of the Sherman Act, the court must address two questions:(1) whether Williams has established there was a valid business reason for such decision, and (2) whether such asserted business reason was merely a pretext for anticompetitive behavior.

As the court sets forth more fully in its findings of fact, given the uncertainty and chaotic conditions in the natural gas industry at the time and the potential take-or-pay liability it was facing, Williams has certainly established a legitimate business reason for its decision to close its pipeline to interim open access.

In addition, it is not disputed that Williams had exposure for up to $100 million in past take-or-pay obligations and was facing at least $7.2 to $13.5 million of take-or-pay exposure over the next few months. Failure to take measures to check that type of exposure could certainly affect a pipeline's ability to provide reliable services to its customers. Furthermore, it is not disputed that Williams incurred the take-or-pay liability in order to insure that LDCs such as the Cities would receive their delivery demands. Thus, both the initial acquisition of take-or-pay obligations and the final response to the potential take-or-pay exposure have now been shown to be reasonable actions taken by Williams to insure reliable service to its customers. *See California Computer Products, Inc. v. IBM*, 613 F.2d 727, 736 (9th Cir. 1979) (holding that a verdict must be directed in favor of defendant when plaintiff's evidence is insufficient to establish the defendant acted unreasonably); and Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 579 (asserts that reasonable actions legitimately taken by a regulated utility to protect its ability to provide reliable service to its customers should not be deemed evidence of willful monopolization).

Moreover, the Cities have not offered sufficient evidence to refute Williams' legitimate business objectives. The only evidence the Cities offer in support of their assertion that such business objectives were mere pretext for an anticompetitive motive are the conclusory affidavits of their experts. In such affidavits the experts conclude that Williams closed its pipeline in order to force the Cities into accepting Williams' high priced sales gas and to force Cities into new five-year contracts with unfavorable terms. However, those experts do not cite any specific factual support for such opinions and do not set forth "a process of reasoning beginning from a firm foundation." *Mid-State Fertilizer*, 877 F.2d at 1339. Thus, such affidavits are insufficient to create a genuine issue of material fact in

this case. *See Key Financial Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 638 (10th Cir. 1987); and *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819, 824, n. 6 (10th Cir. 1987).

In addition, the Cities' arguments are simply implausible given what the record as a whole now reveals. It simply does not make sense that Williams would close its pipeline in order to force the Cities into entering into new five-year contracts, because the record indicates that Williams, shortly after closing the pipeline to interim open access, started revising its S&A and did in fact present its RS&A to FERC for approval on January 4, 1988. (WNG's Final Summ. Judg. Motion, Initial Brief, Tab 3.) Furthermore, it cannot be disputed that Williams' RS&A would have allowed permanent open access for the Cities. *Id.*

Thus, if Williams had intended to force the Cities into accepting its more expensive sales gas for the next five years, it surely would not have embarked, shortly after closing its pipeline to interim open access, on an effort to get the RS&A implemented, because as soon as such was in effect Williams would have been required to provide permanent open access. (WNG's Final Summ. Judg. Motion, Initial Brief, Tab 3.) Furthermore, FERC's temporary waiver of 18 C.F.R. § 284.10 would have ended after Williams became a permanent open-access provider. *Northwest Central Pipeline Corp.*, Docket No. RP86-155-000, 36 F.E.R.C. ¶ 61,371, p. 61,907 (Sept. 26, 1986). Therefore, any LDC with a firm sales contract would have had the right to convert its sales obligation into a proportional firm transportation obligation. 18 C.F.R. § 284.10.

In sum, this court's finding that Williams has established that it was motivated by legitimate business concerns in its decision to reverse its policy of interim open access, and that the Cities have not offered any evidence which could be construed as showing the asserted business motivation was merely a pretext for an anticompetitive mo-

tive, is dispositive of the Cities' general monopolization claim. In other words, since Williams has offered an unrefuted legitimate business justification for its conduct, the Cities cannot show an essential element for an Sherman Act Section 2 claim—"the willful acquisition or maintenance" of monopoly power. *Grinnell*, 384 U.S. at 570-71. Thus, Williams is entitled to summary judgment on the intent to monopolize claim. *See McKenzie v. Mercy Hospital*, 854 F.2d 365, 370 (10th Cir. 1988).

B. Essential Facility Claim

As the Tenth Circuit acknowledged in *Aspen*, if a business controls a scarce resource then it has a duty or obligation to allow even competitors *reasonable* access to the facility. 738 F.2d at 1519. The necessary elements of this doctrine include: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI Communications Corp.*, 708 F.2d at 1132-33. The only two elements at issue for purposes of this summary judgment motion are the second and third ones.

The outer parameter of this doctrine has been illuminated by a recent Second Circuit case affirming the district court's award of summary judgment. *Twin Laboratories v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990). That case ruled that, "[a]s the word 'essential' indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible." *Id.* at 570. This the Cities cannot do.

As is evident from this court's findings in *Chanute II*, slip op. at 38-41, Order No. 451 gas was a feasible alternative that the Cities made a conscious decision not to pursue. Furthermore, in light of the regulatory and economic history that has become evident through discovery

in this case, it is now clear that Williams' sales gas price was reasonable.

As the court has already established, the Cities have not presented any competent evidence showing that WNG sales gas was priced higher because of some predatory motive. In fact, the record establishes the WNG sales gas was priced higher because of the nonprice incentives incurred by WNG in an effort to assure an adequate supply for its firm requirement customers--such as the Cities. Thus, since WNG's sales gas price was reasonable given the regulatory and economic history in the natural gas industry, WNG sales gas has also now been established as a feasible alternative to third party transportation gas.

Therefore, since the Cities had reasonable alternatives, it is clear the Cities cannot prove they were denied access to an essential facility. As a result, Williams is entitled to summary judgment on the essential facility claim. *McKenzie*, 854 F.2d at 370.

C. Monopoly Leveraging

The first question the court must address here is whether this circuit would recognize monopoly leveraging as a separate offense under Section 2 of the Sherman Act or whether it is merely one way of proving unlawful monopolization.

To establish this cause of action the Cities rely primarily on *Berkey Photo Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). However, in a very recent case the Second Circuit, after noting that *Berkey Photo*, 603 F.2d at 284, stated "it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market," said such was dictum and that such case involved a "tying" claim. *Twin Laboratories*, 900 F.2d at 570.

Thus, this court believes that this circuit would not recognize monopoly leveraging as a separate offense under Section 2 of the Sherman Act.[21] Since it has been established herein that Williams was motivated by legitimate business concerns in its decision to reverse its policy of interim open access and that the Cities have not offered sufficient evidence which could be construed as showing the asserted business motivations were merely a pretext for an anticompetitive intent, the Cities cannot show the willful maintenance of monopoly power—a necessary element of a Sherman Act § 2 claim. Therefore, since the Cities cannot establish a general monopolization claim, the Cities' monopoly leveraging claim also cannot be established.

D. Attempted Monopolization

In this circuit, the following four elements must be established to prove the offense of attempted monopolization:

> (1) relevant market, (2) dangerous probability of success in monopolizing the relevant market, (3) specific intent to monopolize, and (4) conduct in furtherance of the attempt.

Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 823 (10th Cir. 1987).

As the court points out in its findings of fact, the Cities have not presented any evidence in this case which could be construed as indicating Williams had the specific intent

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[21] *But see Panhandle*, 730 F.Supp. at 922-26. Although the *Panhandle* court predicted the Second Circuit would recognize monopoly leveraging as a separate offense under Section 2 of the Sherman Act, it said one of the necessary elements for such a claim was that the conduct be "done with the specific intent to gain an unwarranted competitive advantage in the second market." 730 F.Supp. at 925. The Cities could not prove this element on the record before the court because, as the court sets forth *infra* under the commentary on attempted monopolization, the Cities have not presented any evidence which could be construed as showing the necessary specific intent.

to monopolize. For instance, the only evidence presented by the Cities which could even arguably support such a finding is the fact WNG reversed its policy of interim open access and the conclusory opinions of some experts. However, as has been previously noted, because of the regulatory turmoil, economic uncertainty, and the take-or-pay exposure WNG was facing at the time, the decision to close its pipeline to interim open access cannot evidence an intent to monopolize. Furthermore, the Cities' experts, who state that it is their opinion that Williams closed its pipeline to force the Cities to agree to enter into five-year sales contracts, cite no record support for such opinion and do not set forth "a process of reasoning beginning from a firm foundation." *Mid-State Fertilizer*, 877 F.2d at 1339.

Moreover, the record in this case establishes that Williams was diligent in pursuing a solution which would allow for permanent open access while affording it some take-or-pay protection. Thus, since the Cities have not come forward with any evidence which could show Williams possessed the necessary intent, Williams' summary judgment motion against the Cities' attempted monopolization claim is granted. *See First National Bank of Arizona v. Cities Service Co*, 391 U.S. 253, 277, 289 (1968); and *Craig v. Sun Oil Co.*, 515 F.2d 221, 225 (10th Cir. 1975).

E. Transitory Effect of Williams' Conduct

The above findings are also supported by the fact that Williams' conduct was necessarily transitory in nature.

It is not disputed that at the time of the asserted anticompetitive conduct by Williams, FERC had imposed a regulation which required interstate pipelines to allow firm sales customers such as the Cities to convert their sales obligations to transportation obligations. 18 C.F.R. § 284.10. Furthermore, as this court recognized in *Chanute II*, slip op. at 19-23, Williams only received a limited waiver of such provision for an interim period. Thus, Williams

clearly did not have unfettered authority to continue with a closed system.

Moreover, as the court set forth more fully in its finding of facts, the record indicates that after receiving such limited waiver Williams did in fact diligently seek the issuance of a permanent open-access certificate. Therefore, this is the type of case where the triple damage sanction of the Clayton Act is too harsh a remedy because the asserted unfair methods of competition only threaten to have a transitory impact on the marketplace. *Colorado Interstate Gas v. Natural Gas Pipeline*, 885 F.2d 683, 697 (10th Cir. 1989). *See also Reazin*, 899 F.2d at 968 ("market power, to be meaningful for anticompetitive purposes, must be durable").

Therefore, based on the above findings of fact and conclusions of law the court finds that Williams' motion for summary judgment on all of the Cities' remaining antitrust claims should be granted.

IT IS ACCORDINGLY ORDERED this 27th day of July, 1990, as more fully set forth herein, that Williams' motion to strike some of the Cities' affidavits (Dkt. No. 259) is denied in part and granted in part.

IT IS FURTHER ORDERED that Williams' motion for summery judgment (Dkt. No. 252) on all of the Cities' remaining Sherman Act Section 2 claims is granted.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

NO. 87-1463-K

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; and CITY OF OSAGE CITY, KANSAS,
Plaintiff, Appellant,

vs.

WILLIAMS NATURAL GAS COMPANY,
Defendant, Appellee.

February 16, 1990

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

Plaintiffs, the cities of Chanute, Auburn, Garnett, Humboldt, Iola, Neodesha, and Osage City, Kansas, and Cleveland, Oklahoma ("the cities"), filed this action on August 3, 1987, seeking injunctive relief and damages against the defendant, Williams Natural Gas Company ("Williams" or "WNG"). The cities claim that Williams' decision to reverse its policy of interim open access to third parties wanting to use its gas pipelines to transport gas (closing its gas pipeline to the transportation of third party gas) violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and prays for damages pursuant to § 4 of the Clayton At, 15 U.S.C. § 15.

On August 7, 1987, a hearing was held before the Honorable Frank G. Theis on plaintiffs' motion for a temporary restraining order. Judge Theis denied the plaintiffs' motion in a ruling from the bench. Subsequently, the cities filed a motion for preliminary injunction. Hearings on the preliminary injunction motion were held before this court on October 20-23, 27-28 and November 16-19, 1987, and final oral argument was heard on January 25, 1988. On February 5, 1988, this court granted plaintiffs' preliminary injunction and ordered Williams to reopen its lines to third party gas transportation. This court found, in pertinent part, that the cities did face possible irreparable harm by losing a potential supplier of low-cost, long-term gas from a dependable third party supplier, and that such harm outweighed the take-or-pay exposure Williams would face if the injunction was granted. *City of Chanute, Kan. v. Williams Natural Gas Co.*, 687 F Supp. 1517, 1530 (D. Kan. 1988). Williams appealed the preliminary injunction order, and the Tenth Circuit Court of Appeals, on March 3, 1988, temporarily stayed the injunction pending appeal. On July 20, 1988, the Federal Energy Regulatory Commission (FERC) issued, and Williams accepted, a permanent open access certificate. Thereafter, on July 22, 1988, the appeal to the Tenth Circuit and the preliminary injunction motion were withdrawn by stipulation of the parties. In an order issued on July 26, 1988, the Tenth Circuit approved the stipulations of the parties, vacated the preliminary injunction, and vacated its prior stay order.

This matter is now before the court on WNG's motions for partial summary judgment pursuant to Fed.R.Civ.P. 56(d). In its first motion, filed October 19, 1989, Williams asserts that as a result of certain contractual obligations between some of the cities and itself, some of the cities have not suffered any "antitrust injury" and therefore do not have standing to recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. More specifically, Williams moves for summary judgment on the treble damage

claims of the cities of Auburn, Iola, and Osage City for the entire period (August 1, 1987 through August 5, 1988), and against Chanute, Neodesha, and Humboldt for claims arising prior to April 22, 1988. In its second motion, filed December 1, 1989, Williams seeks summary judgment on the cities' tying claims brought pursuant to § 1 of the Sherman Act. In its third motion, filed December 1, 1989, Williams seeks summary judgment on the cities' claims for "extended period damages" (consequential damages covering the period August, 1988 through August, 1993) included within the treble damages claim. The court heard oral arguments on all three of the above-mentioned motions on January 29, 1990.

After consideration of the extensive briefs filed by both parties and after hearing the parties' oral arguments, the court announced it would find as follows: (1) affirm Williams' motion for summary judgment on the treble damage claims of the cities of Auburn, Iola, and Osage City for the entire period (August 1, 1987 through August 5, 1988), and against Chanute, Neodesha, and Humboldt for claims arising prior to April 22, 1988, since the cities have not suffered any antitrust injury and thus lack standing to recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15; (2) affirm Williams' motion for summary judgment on the cities' tying claims brought pursuant to § 1 of the Sherman Act; and (3) deny in substantial part Williams' motion for summary judgment on the cities' claims for extended period damages.

As a result, the cities of Auburn, Iola, and Osage City do not have a claim for treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, under either § 1 or § 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. In addition, the cities of Chanute, Neodesha, and Humboldt only have a possible claim for treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, to the extent they can show antitrust injury and damages under § 2 of the Sherman Act, 15 U.S.C. § 2, arising after April 22, 1988. The cities

of Cleveland and Garnett only have a possible claim for treble damages pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, to the extent they can show antitrust injury and damages under § 2 of the Sherman Act, 15 U.S.C. § 2.

After announcing the above findings, however, the court stated that such rulings would be stayed until it issued a full written memorandum and order. Accordingly, the court is now prepared to make written findings and conclusions on Williams' summary judgment motions.

Summary Judgment Standard

It has been stated by many courts that summary judgment should be used sparingly in antitrust cases. *See e.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). However, this does not mean that summary judgment should not be granted in an appropriate antitrust case. For example, the Supreme Court has said the following:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

First Nat. Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 290, *reh'g denied*, 393 U.S. 901 (1968). In addition, *City Services* established that Rule 56(e)[1] retains its full

[1] Rule 56(e) provides in pertinent part as follows:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule,

effect in antitrust cases. *Id.* at 289-90. Thus, when the moving party identifies the parts of the pleadings, the affidavits, and the discovery materials which it feels demonstrate that there is no genuine issue of material fact, the nonmoving party must go beyond the pleadings and demonstrate to the court that there are specific facts which indicate that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In addition, the Tenth Circuit has said that mere conclusory allegations in an antitrust action do not establish an issue of fact under Fed.R.Civ.P. 56. *Key Financial Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 638 (10th Cir. 1987); *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d 819, 824 n. 6 (10th Cir. 1987). Furthermore, the Supreme Court has recently said that in order to survive a summary judgment motion in an illegal conspiracy antitrust action, the opponent of the motion must establish a "genuine" issue of material fact and that the "opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*, 475 U.S. 574, 586 (1986).

In considering a motion for summary judgment, this court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir. 1988). Further, the party moving for summary judgment must demonstrate its entitlement beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disprove plaintiff's claim, but rather, must only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*,

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must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

812 F.2d 1319, 1323 (10th Cir. 1987). In addition, one of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reference to this court's prior opinion granting the cities' preliminary injunction request, *City of Chanute*, 678 F.Supp. 1517, the court notes that it is not bound by the "findings" in that case for purposes of the current summary judgment motion. Pursuant to Fed.R.Civ.P. 54(b), this court always retains jurisdiction to modify or rescind a prior interlocutory order until final decree. *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1121 (10th Cir. 1979). In addition, "[t]he 'antitrust standing' requirements for claimants seeking only injunctive relief concededly are less stringent than are those for claimants seeking treble money damages" pursuant to § 4 of the Clayton Act. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). Thus, a somewhat different standard is used in evaluating the cities' current money damages claim than was used in evaluating the cities' prior request for a preliminary injunction.

Furthermore, in *City of Chanute*, 678 F.Supp. at 1525, this court acknowledged that if the first three prerequisites of a preliminary injunction are present,[2] then the standard for the fourth element of a preliminary injunction[3] could

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[2] The first three elements a movent must establish before a preliminary injunction may be granted include: (1) a showing that the movant will suffer irreparable injury unless the injunction issues; (2) proof that the threatened injury outweighs whatever damages the proposed injunction may cause the opposing party; (3) a showing that the injunction, if issued, would not be adverse to the public interest. *City of Chanute*, 668 F.Supp. at 1525.

[3] The regular standard for the fourth element of a preliminary injunction is "a substantial likelihood that the movant will eventually prevail on the merits." *City of Chanute*, 678 F.Supp. at 1525.

be lessened. The Tenth Circuit has said, concerning the lesser standard for the fourth element, that "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964); *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980).

Since this court found that the first three prerequisities of a preliminary injunction were present in *City of Chanute*, the lesser standard for the fourth element was applied. As a result, this court merely found in *City of Chanute*, 678 F.Supp. at 1534, that the cities raised questions going to the merits "so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." Thus, it would not be inconsistent for this court to now grant the summary judgment motion against the cities. Some of the reasons why it would not be inconsistent to so rule include: as pointed out earlier, a somewhat different standard is to apply for purposes of a summary judgment motion; the court has now had the benefit of oral argument and extensive briefing filed after thorough discovery; and the court has now had the opportunity to review several recent decisions that illuminate the turmoil in the natural gas industry during the relevant time and which offer guidance to the court on how this case should be decided.

Statement of Facts

Since the court rules in *City of Chanute*, several other courts have addressed aspects of the industry-wide pipeline transportation problem in the natural gas industry. *See e.g., State of Illinois v. Panhandle Eastern Pipeline Co.*, No. 84-1048 (C.D. Ill. Jan. 2, 1990) hereinafter *Panhandle* (excellent analysis on the economic and regulatory history in the gas industry that precipitated the current transportation problem). However, since the factual background

for this case has been previously set forth in *City of Chanute*, 678 F.Supp. at 1516-21, and neither party has brought to the attention of the court any material dispute with such factual background, the court will adopt those facts as background information and will not repeat such for purposes of the present motions. In addition, this court's analysis in *City of Chanute*, 678 F.Supp. at 1521-25, on the economic and regulatory environment in the natural gas industry, is relevant to the motions now before the court and will only be modified, at this point, by noting subsequent events which serve to update such analysis.

Under the commentary on Order No. 436, *City of Chanute*, 678 F.Supp. at 1523-24, it should be noted that the Federal Energy Regulatory Commission (FERC) issued, pursuant to § 7 of the Natural Gas Act of 1938, 15 U.S.C. § 717f, and Williams accepted on July 20, 1988, a permanent open access certificate. Thereafter, on July 22, 1988, the appeal to the Tenth Circuit of this court's ruling in *City of Chanute* and the preliminary injunction motion were withdrawn by stipulation of the parties. The Tenth Circuit approved the stipulation, vacated the preliminary injunction and vacated its stay by its order dated July 26, 1988. The stipulation provides in relevant part as follows:

> This Stipulation shall be treated as WNG's commitment to provide the Cities with firm and/or interruptible transportation service in accordance with WNG's FERC tariff;
>
> . . . .
>
> WNG and the Cities hereby agree mutually to terminate all sales contracts between them that have not already expired, and the Cities agree not to oppose abandonment of sales service in proceedings to be initiated by WNG before the FERC;
>
> The Cities shall be subject to only those charges and procedures for interruptible and/or firm

> transportation services they receive as are contained in the rates and procedures in WNG's transportation tariffs on file with the FERC from time-to-time.

(WNG's lack of standing motion, Initial Brief, Appendix 15.)

Finally, it should be noted that on August 5, 1988, the cities began purchasing 100% of their gas requirements from Vesta/Edison and several producers of local gas. (WNG's lack of standing motion, Initial Brief, p. 3 (not controverted by plaintiffs and thus deemed admitted under D.Kan. Rule 206(c).) On July 19, 1989, FERC issued an order approving abandonment of WNG's sales obligations to the cities. *Williams Natural Gas Company*, Docket Nos. CP-23-000, CP89-64-000, and CP89-67-000, 43 F.E.R.C. ¶ 61,057 (July 19, 1989). The order was to have retroactive effect back to the date the cities started receiving 100% transportation gas from WNG. *Id.*

Under the commentary on Order No. 451, *City of Chanute*, 678 F.Supp. at 1524-25, it should be noted that on September 15, 1989, the Fifth Circuit found that FERC had exceeded its authority as conferred by Congress, in the promulgation of Order Nos. 451 and 451-A. *Mobil Oil v. F.E.R.C.*, 885 F.2d 209 (5th Cir. 1989). Furthermore, it should be noted that under the commentary on Order No. 500, *City of Chanute*, 678 F.Supp. at 1525, Order No. 500 has been remanded to FERC for, among other reasons, failure to adequately explain its reasoning, failure to adequately deal with the take-or-pay problem, and failure to comply with the mandate of *Associated Gas Distributors v. FERC*, 825 F.2d 981 (D.C. Cir. 1987). *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989); *see also Associated Gas Distributors v. FERC*, ___ F.2d ___ (D.C. Cir. Dec. 28, 1989) (1989 WL 15160).

The court notes that there are many asserted factual issues raised by the cities and several arguments by both

parties that the court does not address herein. The reason they are not addressed is either that the court has determined such arguments and asserted factual issues are without merit, or that they are not necessary to the court's conclusion. In addition, there are several facts on which the cities do not have a material dispute and will consequently be deemed established for purposes of this case.

For instance, the cities assert that factual issues remain in the determination of whether the contracts in question for WNG's lack of standing summary judgment motion[4] were extended or renewed in accordance with the terms of the original agreement, and thus,whether the contracts were in effect and enforceable during the closed period. (WNG's lack of standing motion, Cities' Response Brief, Appendix 1.) Such fact is without material dispute because each of those contracts specifically incorporated the terms of WNG's FERC tariff into the contract at paragraph 3. (WNG's lack of standing motion, Initial Brief, Appendices 2-7.) The tariff contains an "evergreen" provision which states in relevant part the following:

> Each such contract shall be considered as renewed and extended . . . for additional periods of five years each *unless* either party gives the other written notice at least ninety days prior to the expiration date of the original or any succeeding or extended term of its intention to terminate the contract on that date.

WNG's lack of standing motion, Reply Brief, Appendix 1, § 14 (emphasis added).)

Thus, the contracts automatically renew for five more years unless there is written notice of an intent to ter-

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[4] The contracts and effective dates in question are the contracts of the cities of Chanute, Humboldt, and Neodesha, until April 22, 1988, and the cities of Auburn, Iola, and Osage City until WNG reopened its pipeline to third party transportation.

minate. For the contracts in question (those of the cities of Auburn, Iola, Osage City, Chanute, Neodesha, and Humboldt), the record does not reflect any notice which would have terminated the contracts during the relevant time. Furthermore, the Index of Purchasers, which is an official part of WNG's tariff, subject to challenge at any time in a FERC proceeding, and served on all jurisdictional customers (including the cities) pursuant to 18 C.F.R. § 154.22 (1989), shows that as each city's contract expiration date passed, the termination date reflected in the tariff moved forward five years—reflecting renewal under the evergreen clause. (WNG's lack of standing motion, Reply Brief, Appendix 2.)

Furthermore, the cities' own reliance and admissions clearly indicate that the contracts in question were enforceable during the relevant time period. For example, the cities who entered into contracts with Edison and Vesta specifically made sure that those contracts did not restrict the cities' rights to purchase natural gas from WNG. (WNG's lack of standing motion, Initial Brief, Appendix 20, prov. 1.4 of the agreements.) In addition, Humboldt and Neodesha both provided written notice to WNG, pursuant to § 14 of the tariff, that they wished to terminate their contracts with WNG when the contracts were scheduled to terminate on April 22, 1988. (WNG's lack of standing motion, Reply Brief, Appendices 3 & 4.) Moreover, throughout the preliminary injunction hearing in this case, the cities referred to their requirements contracts with WNG as being in force. (WNG's lack of standing motion, Reply Brief, Appendix 6.) Therefore, it is clear that any assertion by the cities that the contracts were not in force is truly without merit.

The cities also argue that there is a disputed factual issue over whether the contracts at issue for this motion were validly entered into, and thus, whether the contracts were enforceable at the relevant time. In support of this argument the cities claim that there is evidence in the

record that the cities had no alternative but to accept the contract terms proposed by the pipeline. (WNG's lack of standing motion, Cities' Response Brief, p. 4, ¶¶ 6 & 7.) In addition, the cities claim that a decision by the Kansas Corporation Commission (KCC) issued in 1974, in which the KCC found that direct sales contracts of the gas pipelines were not governed by federal regulation (FERC) and that consequently there was a need for the KCC to regulate such contracts since the gas pipelines had monopoly power, supports their argument that the cities had no alternative but to accept the contract terms proposed by the pipeline. (WNG's lack of standing motion, Cities' Response Brief, Appendix 10, p. 32, ¶¶ 11 & 13.)

However, direct sales contracts are not at issue for purposes of the present motion. Furthermore, the cities do not dispute that at all relevant times, for purposes of this lawsuit, the requirement contracts, which are at issue for purposes of the present motions, were subject to FERC regulation. Moreover, Judge Mihm has recently noted that prior to 1975,[5] the gas "industry was regulated so strictly that there was no real opportunity for other alternatives, such as a transportation service only, to develop." *Panhandle*, slip op. at p. 10. Judge Mihm also points out that during the late 1960s and into the 1970s there was a natural gas shortage. *Id.* at 7. As a result, the local distribution companies (LDCs) and their customers wanted assurance that their delivery of gas would not be curtailed. To get this assurance the LDCs agreed that they would purchase all of their natural gas from a single interstate pipeline, and in return the pipeline agreed to give its "best efforts" to see that the LDCs received whatever amount of natural gas was needed to meet their customers' needs. *Id.* Thus, since the cities entered into these contracts to

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[5] Most of the contracts at issue for the present motion were entered into before 1975. (*See* WNG's lack of standing motion, Initial Brief, Appendices 2-7.)

further their own self interests and the contracts at issue have been subject to FERC regulation at all relevant times for this suit, for the cities to now claim that there is a factual dispute over whether these contracts were validly entered into is simply without merit.

The cities also claim there is a material fact issue over whether they are "full requirement customers" of WNG, because WNG's tariff contains a local gas exception.[6] However, this issue is irrelevant for purposes of the present motions. The present motions do not address the issue of whether WNG denied transportation of gas which may come within the local gas exception. All that the present motions address is whether WNG's refusal to transport Vesta/Edison gas during the closed period violated the antitrust laws. The cities do not, and could not realistically, assert that Vesta or Edison would fall under the local gas exception. *See City of Chanute*, 678 F.Supp. at 1529, n.5. Furthermore, the only sense in which the "full requirement" provision of the contracts at issue is relevant, is to show that the cities could not have purchased gas from Vesta or Edison but for the interim waiver granted by FERC of such provision, and that issue is not disputed.

The cities also assert that a material fact issue remains as to "whether Cities were ever informed of WNG's opinion as to the temporary waiver of the cities contracts." (WNG's lack of standing motion, Cities' Response Brief, Appendix 1, p. 12.) This argument is also without merit.

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[6] The requirements provision provides in relevant part as follows:

> The Company agrees to sell and deliver and the Utility agrees to purchase and receive and pay for, under the conditions hereinafter recited, all of the natural gas required by the Utility (subject to applicable curtailment and interruption provision of the Company's rate schedules) to supply the demands of all of its customers in and about said City.

(WNG's lack of standing motion, Initial Brief, Appendices 2-7.)

On August 28, 1986, WNG's predecessor (Northwest Central Pipeline Corp. (NWC)) filed new tariff sheets which were proposed to become effective September 27, 1986. Accompanying the proposed tariffs was a letter to the FERC secretary which explained what NWC was wanting and why FERC should grant NWC's request. That letter states in relevant part as follows:

> As discussed more fully below, these tariff sheets when made effective will permit Northwest Central to offer new firm and interruptible transportation services under Section 311 of the Natural Gas Policy Act and the Commission's Order No. 436, but without subjecting Northwest Central to the contract demand reduction/ conversion requirements of Section 284.10 of the Commission's Regulations. Northwest Central specifically requests waiver of Section 284.10 and other waivers needed to implement the tariff sheets as described below.
>
> . . . .
>
> In addition to the requested waiver of Section 284.10(a) of the Commission's regulations, Northwest Central requests a *temporary waiver of the "full requirements" provisions of Northwest Central F, C and I Rate Schedules* and related service agreements *to the extent necessary* to assure that the subject interim interruptible and firm transportation is applicable and available on a nondiscriminatory basis—to both sales customers, end-users served by such customers and other potential shippers, as well as existing T-1 shippers.
>
> . . . . .
>
> Northwest Central submits that in order to protect Northwest Central and its customers from

> economic harm during the period when Northwest Central's bona fide comprehensive open-access transportation proposal is awaiting Commission approval, the Commission should grant the *limited waivers* sought herein and permit such interim transportation to become effective on September 27, 1986 and to continue thereafter for a period ending with the effective date of the tariff sheets implementing Order No. 436 open-access transportation as provided for in the pending Stipulation. Such approval of Northwest Central's interim transportation proposal would be entirely consistent with the objective of Order No. 436 to make non-discriminatory transportation available to its customers and all potential Shippers.

WNG's lack of standing motion, Reply Brief, Appendix 7, pp. 1, 7-9 (emphasis added).)

It is clear from the above-emphasized language that only a temporary waiver, limited in nature, was sought. Furthermore, the cities were sent service copies of the application for the waiver. *See* 18 C.F.R. §§ 154.16, 154.22 (1989); and (WNG's lack of standing motion, Reply Brief, Appendix 7, p. 9). Thus, the cities either knew or should have known that the waiver sought was only temporary and limited in nature.

Further support for the cities' notice or knowledge of the limited nature of the applicable waiver is in a letter from NWC to the cities which states in relevant part as follows:

> Please be advised that [NWC] has requested that the [FERC] make effective December 23, 1986 revised tariff sheets in Docket No. RP86-115 to enable NWC to commence interim open access transportation. *The interim transportation period will extend until the earlier of May 1, 1987*

> *or 10 days after the [FERC] issues a final order on the merits of NWC's comprehensive open access filing in Docket No. RP86-32 or blanket certificate filing.* Effective 8:00 a.m. on December 23, 1986, NWC is accepting requests for and undertaking new NGPA Section 311 transportation arrangements on behalf of intrastate pipelines and local distribution companies, as prescribed by the revised tariff sheets in Docket No. RP86-155 and the Commission's Regulations.

WNG's lack of standing motion, Initial Brief, Appendix 8.) In addition, the cities' knowledge of the temporary nature of the full requirement provision waiver is evidenced by the specific inclusion of the inability or refusal of any third party pipeline to transport gas as a *force majeure* event under its contracts for the supply of gas from Vesta and Edison. (*See* WNG's extended period damages motion, Cities Response Brief, p. 22, n. 7.) Thus, from all of the above, it is clear the cities either knew or should have known that the pipeline was only seeking a temporary waiver which was limited in nature.

The cities also claim that material fact issues remains over whether FERC in fact granted WNG an indefinite and irrevocable waiver of the full requirements provisions, and whether WNG had authority to terminate interim open access. (WNG's lack of standing motion, Cities' Response Brief, Appendix 1, p. 12.) Although determination of these issues require primarily conclusions of law and not a findings of fact, the court will address these issues in full at this point for simplicity purposes.

As the court has previously noted, the cities had notice of Williams' belief that the waiver of the full requirements provisions was limited and temporary in nature. Furthermore, the court finds, as is more fully set out hereafter, that the waiver was in fact temporary and limited in nature.

In an order issued on September 29, 1986, FERC responded to NWC's requests for temporary waivers of its full requirement provision in its contracts along with a waiver of 18 C.F.R. § 284.10(a)(1). That order states in relevant part as follows:

> At the time we first granted waivers of section 284.10(a)(1), and developed the relevant criteria, we anticipated proceeding expeditiously to resolve the pending Order No. 436 applications of the pipelines. Because of the great number of filings, the number of intervenors, the many complex issues of first impression, the procedural regulations requiring adequate notice to interested persons, and the highly contested nature of the application proceedings in general, the cases have not been resolved as quickly as anticipated. As a result, we have concluded that the public interest would best be served by granting *limited waiver for an interim period* to facilitate the movement of natural gas during the period while their applications are pending. Accordingly, we will grant Northwest Central's request for waiver of Section 284.10(a)(1).
>
> Consistent with our previous action in granting waiver, we shall limit its term until the earlier of January 1, 1987, or 30 days after the Commission issues an order on the merits of Northwest Central's S&A, or upon its blanket certificate application.
>
> . . . .
>
> *Northwest Central also requests temporary waiver of the full requirements provisions of its F, C, and I Rate Schedules and related service agreements. We will grant waiver of these provisions* in order for Northwest Central to provide

transportation in a nondiscriminatory open- access manner.

. . . .

The Commission orders:

. . . .

(B) Northwest Central's request for waiver of section 248.10(a)(1) of the Commission's regulations filed on August 28, 1986 in Docket No RP86-155-000 is granted. The waiver will continue until the earlier of January 1, 1987 or 30 days after the Commission issues an order on the merits of the S&A or the blanket certificate application.

(C) Waiver of the full requirements provision of Northwest Central's F, C, and I Rate Schedules is granted.

Northwest Central Pipeline Corporation, Docket No. RP86-155-000, 36 F.E.R.C. ¶ 61,371, pp. 61,906-61,907 (Sept. 26, 1986) (emphasis added).

In arguing that FERC did in fact grant an indefinite and irrevocable waiver, the cities put much emphasis on two parts of the above order. First, the cities argue their interpretation of the above order is supported by the fact that FERC specifically notes the waiver of section 284.10(a)(1) is limited to a specific date and then does not note any such limitation on the full requirements provision. In addition, the cities argue that FERC's intended effect of the above order is evidenced by the fact that, after noting that NWC was requesting a temporary waiver, the FERC said, "We will grant waiver of these provisions" without noting any limitation on such waiver. *Id.* However, in making this argument the cities miss two very important points.

First, as has been previously established *infra*, Williams requested, pursuant to § 4 of the NGA and § 311 of the

NGPA, only "a *temporary* waiver of the 'full requirements' provision . . . to the *extent necessary*" to implement its interim program. (WNG's lack of standing motion, Reply Brief, Appendix 7, pp. 7-8) (emphasis added). In addition, in a notice of filing for waiver published in the Federal Register, FERC states the purpose of the request as follows:

> To make these tariff sheets effective on an interim basis Northwest Central requests that the Commission *waive for the interim period* (1) the contract demand reduction/conversion requirements of § 284.10 of the Commission's Regulations, (2) the "full requirements" provisions of Northwest Central's F, C, and I Rates Schedules and related service agreements.

(WNG's lack of standing motion, Reply Brief, Appendix 8) (emphasis added). Thus, it is clear FERC knew and understood that NWC was only seeking a temporary and limited waiver of the full requirements provisions in its contracts.

As a result, if this court were to accept the cities' position, it would have to infer that FERC granted the parties a greater waiver than was requested. However, if the record is taken as a whole, a rational trier of fact could not find for the cities on this issue, and thus it does not create a genuine issue for trial. *See Matsushita*, 475 U.S. at 587. A rational trier of fact would have to find that the remedy granted was greater that requested only if FERC specifically so states.[7]

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[7] In keeping with its limited NGA authority, FERC typically only grants "waivers" of terms of a pipeline's tariffs if such waivers are of limited duration and scope, *see Transwestern Pipeline Co.*, 47 F.E.R.C. ¶ 61,340 (June 7, 1989); *Florida Gas Transmission Co.*, 46 F.E.R.C. ¶ 61,041 (Jan. 13, 1989); *Questar Pipeline Co.*, 44 F.E.R.C. ¶ 61,322 (Aug. 31, 1988); and will refuse "waivers" if the waiver would have a permanent effect. *See Valley Gas Transmission, Inc.*, 47 F.E.R.C. ¶ 61,309 (May 31, 1989); *National Fuel Gas Supply Corp.*, 32 F.E.R.C. ¶ 61,489 (Sept. 30, 1985).

Secondly, the cities misconstrue the nature of this waiver—it was not irrevocable, it was limited in nature. When FERC issued its September 26, 1986 order granting the limited waiver, the proceeding was not a termination or an abandonment proceeding. In fact, FERC later said, in response to a request by Williams' predecessor (NWC) to revise the company's sales and transportation rates and related rate schedules and tariff provisions, the following:

> What Northwest Central is proposing is the conversion of full requirements service to demand limited service, with D1 and D2 billing determinants established unilaterally by the company. This is a radical change from the current sales rate structure. While Northwest Central has a right to propose new sales services, it can not force its customers to give up the sales service they currently receive and take the new service without their consent. *Such an action would constitute an abandonment of service under section 7(b) of the Natural Gas Act, requiring evaluation in a certificated proceeding before the Commission.*

Northwest Central Pipeline Corp., 38 F.E.R.C. ¶ 61,171, LEXIS p. 8 (Feb. 20, 1987) (emphasis added); *see also Reynolds Metal Co. v. F.P.C.*, 535 F.2d 379 (D.C. Cir. 1976); and 15 U.S.C. § 717f.

In order for the waiver to be irrevocable and permanent, as the cities argue, FERC would have had to proceed under formal abandonment proceedings. However, it is clear from the above that FERC did not use that type of proceeding in issuing its September 26, 1986 order granting the limited waiver. *Cf. Federal Power Com. v. Sierra P.P. Co.*, 350 U.S. 348, 353 (1956) (neither the pipeline's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change the pipeline's contract with the distributing company - the

Commission must find that the old rate was "unjust, unreasonable, unduly discriminatory or preferential" before it can change the contract rate without both parties' consent); *ANR Pipeline Co. v. F.E.R.C.*, 771 F.2d 507, 513 (D.C. Cir. 1985) ("When a natural gas company seeks a rate increase, it bears the burden of showing that the increase is just and reasonable; but when the Commission seeks to impose a rate change not proposed by the company, the Commission must first find that the existing rates are unjust or unreasonable, and its finding must be supported by substantial evidence."). *See also United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Panhandle Eastern Pipeline v. FERC*, 881 F.2d 1101 (D.C. Cir. 1989); and *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446 (D.C. Cir. 1988).

Moreover, FERC did not order that WNG and the cities *must* waive their full requirements. It just gave them authority to waive that provision if both parties to the contract so agreed. *See Kansas Power and Light Co. v. F.E.R.C.*, 851 F.2d 1479, 1483 (D.C. Cir. 1988). Thus, if either party determined it no longer would agree to the waiver, then the waiver no longer had effect.

Furthermore, this court's finding that FERC's September 26, 1986 order granting the pipeline waiver of its full requirements provisions in its contracts with the cities was temporary and limited in nature is supported by subsequent statements by FERC regarding the waiver in question. For instance, in response to *City of Chanute*, Williams filed an "emergency abbreviated application" in which it requested permanent certificates of public convenience and necessity pursuant to § 7 of the Natural Gas Act (NGA). Williams claimed that in order to comply with this court's preliminary injunction order and the requirements of the NGA, it must have such certificates to perform the transportation order and abandon the existing sales services. *Williams Natural Gas Company*, Docket No. CP88-229-000, 42 F.E.R.C. ¶ 61,189, p. 61,666 (Feb. 19, 1988). In

response to Williams' request FERC said, in relevant part, the following:

> WNG has the *authority* without further authorization from the Commission, to reverse its August 1, 1987 decision closing its system to open-access transportation and resume the transportation of gas to the cities, and other eligible shippers desiring such service, pursuant to NGPA section 311 and Part 284 of the Commission Regulations.[8] Such transportation would not confront WNG with the dilemma posed by it in its application. Consequently, we perceive no necessity for emergency action on WNG's application.

Id. at p. 61.667 (emphasis added).

Nowhere in the above order did FERC say that Williams acted beyond its authority or was wrong in closing its system to interim open access and enforcing its full requirement contracts with the cities. FERC merely said, "WNG has the *authority* without further authorization from the Commission, to reverse its August 1, 1987 decision closing its system." *Id.* (emphasis added). FERC also said that on "August 1, 1987, WNG *elected* to terminate any further transportation of gas pursuant to NGPA section 311." *Id.* (emphasis added).

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[8] Footnote 4 of the referenced FERC order, 42 F.E.R.C. ¶ 61,189, p. 61, 668, says the following:

> WNG claims that authorization is required under section 7(b) of the NGA before it can discontinue its existing sales service to its full requirements customers. In an order issued September 30, 1986, 36 FERC ¶ 61,371, Northwest Central Pipeline Corporation, now WNG, was granted a waiver of the full requirements provisions of its F, C, and I Rate Schedules and related service agreements to enable it to provide open-access transportation. No time limit on the waiver was included in the order (*Id.* at p. 61,907). To the extent that WNG believes that further waiver is necessary for it to provide transportation pursuant to NGPA section 311, such waiver is granted.

The fact that FERC made such statements is strong evidence that in fact FERC believed WNG had acted within its lawful authority in making the election to reverse its open access policy. In addition, FERC has specifically noted that additional authority is not needed from FERC to terminate an interim open access program implemented under NGPA § 311 if done on a nondiscriminatory basis. *ANR Pipeline Co.*, Doc. No. RP86-105-009, 39 F.E.R.C. ¶ 61, 341, p. 61, 077 (June 19, 1987); *see also Columbia Gas Transmission Corp. v. Louisiana Intrastate Gas Corp.*, Doc. No. CP88-142-000, 43 F.E.R.C. ¶ 61,540 (June 24, 1988); *Valero Transmission Co.*, Doc. No. RM85-1-000, 33 F.E.R.C. ¶ 61,470 (Dec. 31, 1985); and FERC Order No. 436-b, FERC Stats. and Regs. ¶ 30,688 (1986). Thus, in accordance with the above, the court finds that Williams did not act contrary to FERC's mandate or regulations in reversing its interim open access policy and enforcing its full requirement provision in its contracts with the cities.

Conclusions of Law

As reflected by the pretrial order for this case, the cities' claims against Williams may be summarized as follows. First, the cities claim that WNG violated § 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing and attempting to monopolize commerce in the transportation and sale of natural gas. Secondly, the cities claim that WNG violated § 1 of the Sherman Act, 15 U.S.C. § 1, by contracting and conspiring to restrain trade or commerce in the transportation and sale of natural gas. The cities allege that WNG tied the transportation of natural gas to the sale of natural gas by agreeing to transportation only if the cities would purchase natural gas from WNG. Thirdly, the cities allege that WNG's contracts, which WNG claims had "full requirements" provisions that limited the cities' ability to purchase gas from third parties, are contracts that restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The cities request recovery of treble

damages for violation of the Sherman Act, pursuant to § 4 of the Clayton Act, 15 U.S.C. § 15, and recovery of costs for this action, including attorneys' fees and such other relief this court deems just and proper.

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part as follows:

> Every contract ... in restraint of trade or commerce among the several States ... is declared to be illegal: ...

Section 2 of the Sherman At, 15 U.S.C. § 2, defines a violator as:

> Every Person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, ...

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

A. Antitrust Injury

In its first motion filed October 19, 1989, Williams asserts that as a result of certain contractual obligations between some of the cities and itself, some of the cities have not suffered any "antitrust injury" and therefore do not have standing to recover treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. More specifically, Williams moves for summary judgment on the treble damage claims of the cities of Auburn, Iola, and Osage City for the entire period (August 1, 1987 through August 5, 1988),

and against Chanute, Neodesha, and Humboldt for claims arising prior to April 22, 1988. In support of its motion, Williams asserts that it is entitled to summary judgment against the named cities for the stated periods because those cities had an enforceable contract with Williams during the stated times.

The Sherman Act does not punish the mere possession of monopoly power. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62 (1911). A defendant will only face the triple damage sanctions of § 4 of the Clayton Act if the plaintiff can establish each element of an antitrust offense. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 693 (10th Cir. 1989). One requirement that must be established is that, "any private plaintiff seeking treble damages under Section 4 of the Clayton Act must show antitrust injury." *Id.*; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Before addressing the antitrust injury/standing issue, the court acknowledges that the cities are correct in their assertion that "the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified." *United States v. Loew's, Inc.*, 371 U.S. 38, 51 (1962). However, this line of cases finds an antitrust violation only after it has been determined that either the contracts were entered into under unlawful monopoly coercion, to further an unlawful anticompetitive purpose, or a contract right was abused in such a way that it violates the antitrust laws. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (contracts between defendant utility and municipalities constituted territorial allocation schemes); *United States v. Topoco Associates*, 405 U.S. 596 (1972) (horizontal market divisionagreement is a *per se* violation of § 1 of the Sherman Act); *Fortner Enterprises v. U.S. Steel Corp.*, 394 U.S. 495 (1969) (traditional tying arrangements are unreasonable *per se* if the defendant has sufficient economic

power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962) (in tying arrangement involving copyrighted (or patented) material, it is presumed that the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product); *Axis, S.P.A. v. Micafil, Inc.*, 870 F.2d 1105, 1111 (6th Cir 1989) (while a lawfully acquired patent may create a monopoly that does not violate the antitrust laws, patent abuse may constitute an antitrust violation); and *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982) (summary judgment against the plaintiff improper when there is a claim that defendant utility company has manipulated federal and state regulatory processes to achieve anticompetitive results).

It must be noted, however, that the cases which find that the contract in question was entered into under unlawful monopoly coercion or for an unlawful anticompetitive purpose are not controlling on the court because they are distinguishable from the case at bar. For instance, there is no allegation in the case before the court that the contracts between the cities and Williams constituted territorial allocation schemes or horizontal market division agreements. *Otter Tail*, 410 U.S. 366; and *Topoco Associates*, 405 U.S. 596. In addition, as the court sets forth more fully *infra*, this case does not present a claim under a tying arrangement theory. *Fortner Enterprises*, 394 U.S. 495; *Loew's Inc.*, 371 U.S. 38. Finally, there is no claim in this case that Williams has manipulated the interrelationship between federal and state regulation to achieve anticompetitive results. *City of Kirkwod*, 671 F.2d 1173.

Furthermore, there cannot be a claim that the contracts in question were entered into under unlawful monopoly coercion because of the extensive government regulations under which the contracts were entered into and approved.

For instance, as Judge Mihm points out in his recent opinion, a LDC had no substantial interest in avoiding the sole provider provision in its tariff or contract during the late 1960s and 1970s because there was an availability shortage of natural gas to consumers and the LDC knew that under its long-term contract with the pipeline/supplier that the pipeline/supplier would make its "best efforts" to supply whatever amount of natural gas the LDC needed for its customers. *Panhandle*, slip op. at p. 19. In addition, Judge Mihm said the following:

> Because of the degree of regulation of the natural gas industry by statute and regulatory agency, an LDC '. . . could not simply agree with another company to have it build a pipeline to [the LDC's] service area and start pumping natural gas to [the LDC] for its system supply. Rather, such interconnects could only occur with the approval of the FERC, and then only after extended proceedings during which everyone, incuding Aunt Mary, could object to the new interconnets and supply.
>
> This regulatory review of such requests was not intended by FERC to be obstructionist. Rather, it existed to serve the public interest. The delivery of natural gas to the local communities of this country was considered by Congress and FERC too sensitive a matter to be left solely to the good intentions of a profit- motivated industry.

Id. at pp. 20-21. Thus, in accordance with the above reasoning, this court finds that the contracts in question could not have been entered into under unlawful monopoly coercion because of the degree of regulation in the industry.

Moreover, it is not disputed that the cities did not have the right to buy natural gas from Vesta or Edison if the full requirement provisions of the relevant contracts were

enforceable. Furthermore, as is more fully set forth *supra*, the court has previously established that the full requirement provisions were enforceable under applicable FERC regulations and holdings. As a result, if there was an antitrust violation cognizable under § 4 of the Clayton Act, it would have to be because a contract right was *abused* in such a way so as to constitute an antitrust violation. *See Axis, S.P.A. v. Micafil, Inc.*, 870 F.2d 1105, 1111 (6th Cir. 1989) (while a lawfully acquired patent may create a monopoly that does not violate the antitrust laws, patent abuse may constitute an antitrust violation). With this in mind, the court will now address the applicable requirements for establishing an antitrust violation cognizable under § 4 of the Clayton Act.

As this court recognized in *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 635 F.Supp. 1287, 1313 (D. Kan. 1986), the Supreme Court has set forth at least six factors to be considered in evaluating antitrust standing:

> (1) the causal connection between the alleged antitrust violation and the harm; (2) improper motive or intent of defendants; (3) whether the claimed injury is one sought to be redressed by antitrust damages; (4) the directness between the injury and the market restraint resulting from the alleged violation; (5) the speculative nature of the damages claimed; and (6) the risk of duplicate recoveries or complex damage apportionment.

See Associated General Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983); *Blue Shield of Virginia v.McCready*, 457 U.S. 465 (1982); *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

It is important to note, however, that there is a distinction between antitrust standing and antitrust injury. Confusion occurs between the two concepts because they share a common ingredient—both requirements limit "re-

covery to those who have been *injured by* restraint on competitive forces in the economy." *Axis, S.P.A. v. Micafil, Inc.*, 870 F.2d at 1111 (citations omitted, emphasis original). Furthermore, the Sixth Circuit in *Axis* has noted the following distinctions between the two concepts:

> Any inquiry to determine whether antitrust injury has been shown is more limited than one to determine whether the plaintiff has standing. *The single determinant of antitrust injury is whether the plaintiff has suffered an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [a defendant's] act[] unlawful."* *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. On the other hand, even if an antitrust injury is shown sufficiently, standing may be denied on the basis of other factors. The purpose of the additional inquiries is to confine recovery to cases that promote the congressional intent to ensure that consumers receive the benefits of competitive markets.

Axis, 870 F.2d at 1111 (emphasis added).

The way the *Axis* court applied the antitrust injury principle to that case is instructive for the case at bar. The Sixth Circuit found in *Axis* that even though an acquisition by the defendant of another manufacturer may have violated the antitrust laws, the injury from which the plaintiff sought relief was not inflicted by *reason of* the defendant's newly acquired position in the market. *Axis*, 870 F.2d at 1112. Rather, plaintiff's injury was caused by patents and licenses which precluded the plaintiff's entry into the market. *Id.* The court said that although lawfully acquired patents created a monopoly, such does not create a cognizable claim under § 4 of the Clayton Act unless the patent is abused. *See Axis*, 870 F.2d at 1111.

The key question the court must address is whether the decision by Williams to terminate its interim open access

policy caused the cities with valid, enforceable contracts with Williams any "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489 (emphasis original). The very recent opinion by the Honorable Judge Mihm from the Central District of Illinois is instructive on this point.

After doing an extensive historical analysis of the regulatory and economic context of the current industry wide gas/pipeline transportation problem, Judge Mihm said the following:

> Aside from the issue of physical access to the Central Illinois Market, and perhaps more to the point, *it was the G tariff, and not unilateral conduct on the part of Panhandle, which effectively denied access to other suppliers of natural gas* to the Central Illinois Market.
>
> Because of the turmoil in the natural gas industry at the time and the existence of the G tariff (and long term service contracts), this Court cannot find that Panhandle unlawfully denied producers, brokers, and other competitors access to its pipeline system serving the Central Illinois Market.

Panhandle, slip op. at 172 (emphasis added); *see also* slip op. at 131, 166. In addition, Judge Mihm noted that:

> The fact that market conditions changed in the 1980's, making the G tariff less attractive to LDC's does not mean that those LDC's were entitled to immediate gratification of their desire to have access to transport gas. If that logic were followed generally in the law of contracts, then a contract would routinely be voidable, on the option of either party, at any time when such

> party determined that the continued existence of the contract was not in its own best interests. Such is not the law of contracts, and such is not the law of this case.

Panhandle, slip op. at 229.

In this case, FERC approved Williams' tariffs and contracts with the cities. Furthermore, the contracts gave the cities the assurance of a long-term supply of natural gas, but in return for that assurance the cities agreed to buy all their requirements from Williams, with just a few minor exceptions. The Supreme Court has recognized that "at least in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 334 (1961). Therefore, given the historical regulatory and economic environment in the gas industry as set forth by the *Panhandle* court, this court cannot find that Williams abused its monopoly power by exercising rights it lawfully possessed pursuant to its FERC approved tariffs and contracts.

As a result, Williams' decision to reverse its interim open access policy did not cause any antitrust injury to the cities which had an enforceable contract with Williams. *See Axis*, 870 F.2d at 1112. Rather, their injury was cause by the long-term contracts entered into with Williams. *See, Panhandle*, slip op. at 172. Therefore, Williams' motion for summary judgment against the cities, to the extent of their enforceable contractual obligations, should be granted.

Such a finding by this court is also supported by *Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370 (7th Cir. 1986). After citing the general rule that it is abuse, not possession, of monopoly power that violates § 2 of the Sherman Act, Judge Posner said that if a monopolist extends a helping hand to a rival, though not required to do so, and later withdraws it, he does not incur antitrust liability. *Id.* at 376; *see also, Alabama Power*

Co. v. Ickes, 302 U.S. 464, 480 (1938) (plaintiff did not suffer an antitrust injury because plaintiff only anticipates "damage to something it does not possess—namely, a right to be immune from lawful municipal competition").

In addition, the Tenth Circuit has recently said, "We believe the triple damage sanction of the Clayton Act is too harsh a remedy for unfair methods of competition that only threaten to have a transitory impact on the marketplace." *Colorado Interstate Gas*, 885 F.2d at 697. Concerning the cities at issue for purposes of this motion, Williams' decision to reverse its open access policy necessarily only had a temporary impact because the cities' contract obligations were due to expire either on April 22, 1988, or August 22, 1989. *City of Chanute*, 678 F.Supp. at 1520 n. 1. Furthermore, the temporary nature of Williams' action is also evidenced by the fact that permanent open access was granted on July 20, 1988.

B. Tying Claim

As reflected by the pretrial order in this case, the cities claim that WNG violated § 1 of the Sherman Act, 15 U.S.C. § 1, by contracting and conspiring to restrain trade or commerce in the transportation and sale of natural gas. The cities allege that WNG tied the transportation of natural gas to the sale of natural gas by agreeing to transportation only if the cities would purchase natural gas from WNG.

Williams moves this court for summary judgment on the cities' claims brought pursuant to § 1 of the Sherman Act. In support of its motion, Williams claims that the cities were not "forced" to purchase gas from Williams in order to obtain transportation service from Williams during the period Williams did not provide open access transportation. In addition, Williams claims that the cities cannot demonstrate that Williams has an economic interest in the tying product—the natural gas commodity sold by Williams.

In order to prevail on a § 1 tying claim, the plaintiff must first show that the alleged tying arrangement is "concerted activity by individual actors." *McKenzie v. Mercy Hosp. of Independence, Kansas*, 854 F.2d 365, 367 (10th Cir. 1988) (quoting *Card v. National Life Insurance Co.*, 603 F.2d 828, 834 (10th Cir. 1979)). Furthermore, a fundamental prerequisite of a § 1 tying claim is that the unlawful conduct be by "two or more parties pursuant to an agreement, express or implied. Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited by Section 1. Rather, to establish an unlawful combination or conspiracy, there must be evidence that two or more parties have knowingly participated in a common scheme or design to accomplish an anticompetitive purpose." *Id.* (citations omitted).

The cities in this case fail to make a showing of any such agreement. The cities allege that Williams, by its *unilateral* conduct in reversing its open access policy, caused them injury, and that as a result of Williams unilateral conduct, they had to purchase gas from Williams. Thus, they fail to make a showing of any agreement to knowingly participate in a common scheme or design to accomplish an anticompetitive purpose.

In addition, a finding by this court that the cities' tying claim cannot withstand a summary judgment motion is also supported by Williams' argument that it did not "force" the cities to buy its natural gas. One of the elements of a tying claim is that "purchases of the tying product must be conditioned upon purchases of a distinct tied product." *Fox Motors, Inc. v. Mazda Distributors (Gulf)*, 806 F.2d 953, 957 (10th Cir. 1986).

In this regard, Williams argues that the cities could have purchased FERC Order 451 gas during the relevant period. 51 Fed. Reg. 22,168 (1986). Moreover, the cities would have had a right of first refusal to FERC Order 451 gas and Williams would have been required to transport such

gas. 18 C.F.R. § 270.201(g) & (h) (1989). Therefore, the cities cannot establish that purchases of the tied product (natural gas sales) were conditioned upon the purchases of the tying product (natural gas transportation). As a result, the cities will not be able to establish one of the necessary elements for a tying claim as set forth in *Fox Motors*, 806 F.2d at 957.

The substance of the cities' responsive assertions to Williams' arguments can be summarized in two assertions. The cities first assert, since the Fifth Circuit has vacated Order Nos. 451 and 451-A, that Order No. 451 is a nullity and must be treated as if it never existed (void *ab initio*). *Mobil Oil v. FERC*, 885 F.2d 209 (5th Cir. 1989). *See also Manhattan General Equipment Co. v. Commission of Internal Revenue*, 297 U.S. 129, 134 (1936); *Dixon v. United States*, 381 U.S. 68 (1965). Secondly, the cities assert that even if Order No. 451 gas is to be considered an alternative in this case, such gas was never available to the cities on a commercially reasonable basis.

The cities' first argument, that Order No. 451 is to be treated as a nullity in this case, is specious. The subsequent reversal of Order No. 451 cannot change the historical fact that during the closed period in question Order No. 451 was in effect and WNG was required to obey its dictates. *See Ecee, Inc. v. FERC*, 611 F.2d 554, 557 (5th Cir. 1980). Furthermore, it cannot be disputed that the cities received numerous offers to sell gas from Order No. 451 producers and that the cities consciously chose not to even enter into negotiations for such gas.

For example, a letter from Cabot Petroleum Corp. dated June 24, 1987, which was apparently sent to all of the cities on July 13, 1987, states in relevant part as follows:

> Cabot has the authority to negotiate and enter into new gas sales contracts with new purchasers. These FERC regulations further require Cabot to offer WNG's existing customers the

> Right of First Refusal to purchase such gas. Accordingly, Cabot hereby offers you, an existing firm customer of WNG, the Right of First Refusal to purchase natural gas from Cabot under the attached "Terms and Conditions of Cabot's Gas Sales Offer To Existing Firm Customers of WNG".

WNG's Motion for Summary Judgment on the Tying Claim, Initial Brief, Appendix 3.) Furthermore, similar letters were sent to the cities from the following: Mesa Operating Limited Partnership, dated November 20, 1987; Tenneco Oil, dated January 15, 1988; Mobil Natural Gas Inc., dated January 29, 1988; and Cities Service Oil and Gas Corp., dated March 30, 1988. (WNG's Motion for Summary Judgment on the Tying Claim, Reply Brief, Appendices 9, 10, 11 and 12.)

In addition, the fact that the cities could have purchased Order No. 451 gas during the closed period is supported by the fact that Leo Edison wrote the cities a letter dated March 28, 1988, which states in relevant part:

> Vesta Energy Company and I have been discussing the possibility of taking some [FERC] Order 451 gas to your and other communities. We could have an excellent 451 package put together and ready to flow by May 1.

(WNG's Motion for Summary Judgment on the Tying Claim, Reply Brief, Appendix 7); *see also* (WNG's Motion for Summary Judgment on the Tying Claim, Initial Brief, Appendices 6, 7, & 8 (although Vesta and Edison bought Order 451 gas and resold it to customers on WNG's pipeline in May, June, and July of 1988, none of it was purchased by the cities).)

Moreover, the cities' conscious decision not to accept Order No. 451 gas is reflected by the fact that the Auburn

City Council's regular meeting minutes of December 7, 1987 say in relevant part the following:

> Larry Hendricks spoke to the Council and Mayor regarding an offer from MESA gas to purchase natural gas from them. Councilman Lively moved, Councilman Brown seconded, that Larry write a letter to MESA concerning the price of the order 451 gas. Motion carried.

(WNG's Motion for Summary Judgment on the Tying Claim, Initial Brief, Appendix 4.) However, the January 4, 1988 regular meeting minutes of the Auburn City Council read in relevant part as follows:

> Larry informed that he has spoken to representatives from other cities and all have agreed not to purchase gas from the MESA Gas Co. because it might be detrimental to our law suite [sic].

Id.

At the very least, these admissions show that the cities made a conscious decision not to buy Order 451 gas even though they knew it was an alternative to accepting Williams' sales gas during the questioned closed period. As a result, the court finds that Order No. 451 gas was a reasonable alternative, even though it may not have been everything the cities wanted. Therefore, since the cities had a reasonable alternative to WNG sales gas which they consciously decided not to even consider, the cities were not *forced* into buying WNG sales gas. Thus, Williams' motion for summary judgment on the cities' Sherman Act § 1 tying claim should be granted.

C. Extended Period Damages

Williams moves this court for partial summary judgment against the cities' claims for "extended period damages" on their treble damages claims for the period August 1, 1987 through August 5, 1988. More specifically, Williams

moves for judgment on the cities' contention that they are entitled to consequential damages covering the period August, 1988 through August, 1993.

In support of its motion, Williams claims that the city of Cleveland, Oklahoma has an enforceable contract to receive gas, and in fact has received gas, pursuant to a contract with Edison executed in 1986. In addition, Williams alleges that if any extended period damages claims of the cities of Humboldt, Auburn, and Osage City exist, they were caused by the refusal of their seller, Leo Edison, to enforce his valid contract with Vesta Energy Company, and were not a consequence of Williams' actions. Williams also asserts that the cities of Humboldt, Auburn, and Osage City have no claim to extended period damages because they now have contractual rights to purchase gas on terms more favorable than those they claim they could have obtained before Williams suspended the interim open access program. Finally, Williams asserts that Iola, Chanute, Neodesha, and Garnett have suffered no extended period damages as a consequence of Williams' actions.

Concerning the city of Cleveland, the plaintiff argues that Edison intended to increase the discount price of $.50 per Mcf to $.75 Mcf so as to treat all of the cities equally. Such a gratuitous modification of the contract by Edison is very unlikely considering Cleveland had a five-year contract at the $.50 Mcf rate. Consequently, the court finds such a claim by the plaintiff is implausible—simply makes no economic sense—and since the plaintiff has not come forward with more persuasive evidence to support this claim, Williams' motion against Cleveland for extended period damages is granted. *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

Concerning the other cities, as is reflected in this court's prior ruling in *City of Chanute*, 678 F.Supp. at 1521, they had not yet entered into a formal long-term contract. As this point the court cannot say, as a matter of law, that

if Williams did in fact commit acts which violate the antitrust laws, that such acts by Williams did not prevent the entering into of such long-term contracts. In addition, this court cannot say as a matter of law what the contract terms would have been if the negotiation process had been completed and factual issues remain on the propriety of Williams' agency theory. Consequently, Williams' motion for partial summary judgment on the cities' extended period damages is denied, except as against the city of Cleveland.

IT IS THEREFORE ORDERED this 16th day of February, 1990, that Williams' motion for partial summary judgment on the treble damages claims of the cities of Auburn, Iola, and Osage City for the entire period (August 1, 1987 through August 5, 1988), and of Chanute, Neodesha, and Humboldt for claims arising prior to April 22, 1988, for failure to show antitrust injury and thus lack of standing under § 4 of the Clayton Act, is granted.

IT IS FURTHER ORDERED that Williams' partial summary judgment motion on the cities' tying claims brought pursuant to § 1 of the Sherman Act is granted.

IT IS FURTHER ORDERED that Williams' partial summary judgment motion on the cities' extended period damages claims is granted as to the city of Cleveland, Oklahoma's claim for such damages, and is denied as to the rest of the cities who still have a possible antitrust claim.

APPENDIX D

UNITED STATES DISTRICT COURT
D. KANSAS

NO. 87-1463-K

CITY OF CHANUTE, KANSAS; CITY OF AUBURN KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; AND CITY OF OSAGE, KANSAS,
Plaintiffs,

v.

WILLIAMS NATURAL GAS COMPANY,
Defendant.

Feb. 5, 1988.

On Motion to Modify Feb. 9, 1988.

Wheatley & Wollesen, Annapolis, Md., Stumbo, Stumbo, Hanson & Hendricks, Topeka, Kan., for plaintiffs.

Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, Okl., Adams, Jones, Robinson and Malone, Wichita, Kan., B.E. Potts, Gen. Counsel, Williams Natural Gas Co., Tulsa, Okl., for defendant.

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

Plaintiffs, Cities of Chanute, Auburn, Garnett, Humboldt, Iola, Neodesha, and Osage City, Kansas, and Cleve-

land, Oklahoma ("Cities"), seek an injunction compelling defendant Williams Natural Gas Company ("Williams" or "WNG") to permanently open access to its interstate natural gas pipeline which is connected to each of the plaintiff Cities. The Cities allege Williams' failure to open access to its pipeline to alternate suppliers of natural gas constitutes an intentional monopoly in violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

This action was filed on August 3, 1987, and on August 7, 1987 a hearing was held before the Honorable Frank G. Theis on plaintiffs' motion for a temporary restraining order. In a ruling from the bench, Judge Theis denied the plaintiffs' motion. The Cities subsequently filed the motion for preliminary injunction now pending before this court.

A hearing on the preliminary injunction motion was held on October 20-23, 27-28 and November 16-19, 1987 (hereafter referred to as "hearing"). After the hearing, the parties submitted extensive briefs detailing their proposed findings of fact and conclusions of law. Final oral argument on the motion was held January 25, 1988, at which time the court announced that it would grant the requested injunction. However, the court stated the injunction would not take effect until it issued a full written memorandum and order. Accordingly, the court is now prepared to make written findings and conclusions on the plaintiffs' motion for a preliminary injunction.

Factual Background

Plaintiff Cities are each municipalities with their own natural gas distribution systems. The Cities purchase natural gas at wholesale and then resell it to residential, commercial and industrial customers within the Cities and surrounding areas.

Defendant Williams Natural Gas is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. Williams is engaged in the business of interstate

sale and transportation of natural gas, and as such is regulated by the Federal Energy Regulatory Commission ("FERC" or "the Commission"). Williams obtains gas from producing fields in various states, transmits the gas to its service areas, and delivers it to customers in Kansas, Oklahoma, Missouri and Nebraska. Williams' customers are primarily of two types: (1) local distribution companies ("LDCs"), such as the plaintiff Cities, which purchase gas from WNG at a "margin" or "markup", and resell the gas to the ultimate consumers; and (2) industrial gas users which purchase gas directly from WNG.

Each of the plaintiff Cities in this action can be characterized as an "LDC" and has or has had a "full requirements" contract with WNG. Under such contracts, the Cities must purchase all of their gas requirements from WNG, and WNG must maintain sufficient gas reserves to meet those requirements. For purposes of this case, there are essentially two types of rates and services available to the Cities under "full requirements" contracts: firm service (F-2 rates—$3.16 and $3.26/mcf), which is primarily for residential customers; and large industrial service (I-2 rates—$2.75/mcf). Under either service, the gas is purchased by the Cities for resale to residential and industrial users.

In addition to these full requirements contracts, all of the Cities, except Auburn and Cleveland, have direct sale contracts with WNG to purchase gas for delivery to and use by the Cities in their municipal electric power plants. These contracts are known as "interruptible service" contracts and differ substantially from "full requirements" contracts. Interruptible service is provided on a "when available" basis, and accordingly, may be interrupted during periods when demand for gas is greatest. Further, either party can terminate such contracts upon 30 days' notice.

With the exception of the cities of Cleveland and Garnett, all of the plaintiff Cities currently have "full requirements" contracts in place with WNG, and the parties continue to operate under those contracts. Cleveland and Garnett's contracts with WNG expired by their own terms in May of 1987.[1] However, those two cities continue to purchase natural gas from WNG under the full requirements resale service provided under WNG's FERC certificate and tariff.

WNG's pipeline is the only major interstate pipeline serving plaintiff Cities, and prior to December, 1986, other natural gas suppliers did not have access to Williams' pipeline. However, prompted by the FERC's issuance of Order No. 436 (see discussion at pp. 12-14), WNG opened its pipeline to transportation gas on an interim basis on December 22, 1986. Under this "open-access" system, the Cities had an opportunity to purchase natural gas from third parties (*e.g.*, other producers and marketing companies) and have that gas transported over WNG's pipeline. In return for transporting the gas, Williams received a fee called a "transportation rate". In order that the Cities could purchase gas from other sources, FERC temporarily waived its certificate and tariff provisions and Williams temporarily waived its "full requirements" contract provisions with the Cities.

Thus, while the "full requirements" provisions were waived, WNG's customers (including the plaintiff Cities) were free to replace all or any part of the gas they normally purchased from WNG with third party gas.

By April of 1987, WNG's customers were purchasing from third parties large volumes of gas previously purchased from WNG. WNG's vice president of marketing

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[1] Williams' firm service contracts with Chanute, Humboldt and Neodesha will expire on April 22, 1988. The Osage City contract expires August 22, 1989, while Iola's contract expires December 22, 1989. Auburn's contract is the last to expire, on December 22, 1990.

and supply, Jack Finch, testified at the hearing that by July of 1987, 80% of WNG's sales of system supply gas had been converted to transportation. Finch further testified that as a result of the reduced sales, WNG's "take-or-pay" exposure increased dramatically during the period of open access. (Note: "take-or-pay" contracts between pipelines and producers commonly require a pipeline to pay for a specified percentage of delivered gas whether or not it is in fact taken).

Despite increasing take-or-pay exposure, WNG was able to keep the pipeline open until August 1, 1987, by negotiating with its producers (primarily Amoco Oil Company) for take-or-pay relief.

During the period of interim open access, each of the plaintiff Cities obtained gas from Vesta Energy Company ("Vesta"), a marketing company engaged in the sale at the wellhead of natural gas supplies. Some of the Cities contracted directly with Vesta while others contracted with a consultant, Leo Edison, who, in turn, contracted with Vesta. The contracts were of varying terms and duration but can be generally categorized as follows:

Cleveland

On December 9, 1986, the City of Cleveland, Oklahoma entered into a "natural gas sale agreement" with Leo Edison, whereby the City agreed to purchase gas from Edison for a period of five years at a specified price of $2.17/mcf, and thereafter at $.50/mcf less than the price of WNG's gas. Pursuant to a written transportation agreement, WNG commenced transportation of that third party gas to the City of Cleveland in February, 1987.

Auburn, Humboldt, Iola and Osage City

The Cities of Auburn, Humboldt, Iola and Osage City also commenced the purchase of third party transport gas in June and July of 1987 under gas purchase agreements with Leo Edison. These agreements were of short-term

duration ending in September or October of 1987, or were month-to-month arrangements which could be cancelled by either party on 30 days' notice. The gas purchased by these Cities was transported by WNG under written transportation agreements with each City.

The source of supply for Edison's contracts with the City of Cleveland, as well as with the Cities of Auburn, Humboldt, Iola and Osage City, was a five-year contract between Edison and Vesta. The contract provided for a base price of $1.50/mcf at the delivery point, to be adjusted every six months based on 70% of the increase or decrease in WNG's average resale price to its customers.

Neodesha, Garnett and Chanute

The Cities of Neodesha, Garnett and Chanute also commenced transportation under WNG's interim open-access program in June, 1987, pursuant to written transportation agreements with WNG and direct sale agreements with Vesta. The City of Chanute purchased gas from Vesta under a month-to-month arrangement while the City of Neodesha purchased gas from Vesta under an agreement covering the months of June and July, 1987 (Pltfs' Ex. 5). The City of Garnett's agreement with Vesta covered only the month of June, 1987. While none of these three cities actually entered into a long-term contract with Vesta, the evidence at the hearing showed that negotiations for a long-term arrangement had been completed between these cities and Vesta when WNG announced the closing of its pipeline effective August 1, 1987. Vesta's vice president of gas sales, David Tudor, testified that except for the starting price, the terms of the long-term agreement contemplated by these three cities and Vesta were identical to the terms of the Vesta/Edison agreement. Tudor further testified that the contracts were not formalized because of uncertainty as to how long WNG would keep its pipeline open.

To summarize, at the time WNG closed its pipeline, the City of Cleveland, Oklahoma, and the Cities of Auburn, Humboldt, Iola and Osage City, Kansas, had available a long-term, low-cost supply of Vesta gas. While the Cities of Garnett, Neodesha and Chanute had no long-term contract in effect with either Vesta or Edison, the essential terms of such a contract had been agreed upon.

When WNG closed its pipeline on August 1, 1987, the Cities were again required to purchase gas from Williams at a price substantially higher than the price of gas available to them through Vesta. The Cities subsequently filed the instant action, alleging WNG's refusal to open the pipeline constitutes monopolization in violation of §2 of the Sherman Act, 15 U.S.C. §2, and seeking an injunction ordering WNG to open access to its pipeline to the plaintiff Cities.

Economic and Regulatory Environment

It is clear to the court that any analysis of this case must take into account the economic and regulatory environment in which the parties were operating. Accordingly, prior to discussing the elements required to issue a preliminary injunction, and whether plaintiffs have met those elements, the court first briefly summarizes relevant regulatory actions and their impact upon the natural gas industry, with particular emphasis on their effect upon the parties to this action.

Since the enactment of the Natural Gas Act of 1938, 15 U.S.C. §717, *et seq.* the natural gas industry has undergone substantial and complicated changes. Yet the fundamental goal of the NGA is still intact—that being to protect consumers from exploitation at the hands of natural gas companies. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610, 88 L.Ed. 333, 64 S.Ct. 281 (1944); *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d 981, 995 (D.C. Cir. 1987). Under the NGA, the Federal Power Com-

mission (the predecessor to FERC) set price ceilings for sales from producers to pipelines and also regulated the prices pipelines could charge to their downstream customers. *Transcontinental Pipe Line v. Oil & Gas Bd.*, 474 U.S. 409, 420, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986). However, the price of interstate gas at the wellhead was fixed well below market and a discrepancy developed between the price for interstate gas and unregulated intrastate gas, and gas production was withheld from the interstate market. *Maryland People's Counsel v. F.E.R.C.*, 761 F.2d 768, 770 (D.C. Cir. 1985).

By the early 1970s, a serious gas shortage had developed, apparently caused in part by an imbalance between supply and demand brought on by the NGA's artificial pricing scheme. Thus, in 1978, Congress enacted "a new system of natural gas pricing" under the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §3301 *et seq. Transcontinental Pipe Line v. Oil & Gas Bd.*, 474 U.S. at 421.

In the NGPA, Congress substantially terminated the Commission's wellhead price regulation by defining eight categories of natural gas production and setting ceiling prices for "first sales" in each category. 15 U.S.C. §§ 3311-33.[2]

The effect of the NGPA on producers, as compared to interstate pipelines, has been summarized by FERC as follows:

> As a direct result of the NGPA, . . . a natural gas producer can now sell "new" gas to any

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[2] The NGPA provided for the almost immediate deregulation of certain "high cost" gas, while for most "new gas" it established new ceilings and provided for gradual increases until scheduled deregulation on January 1, 1985 or July 1, 1987. The NGPA did not deregulate "old" interstate gas, but instead provided for adjustment of the price ceilings for inflation and authorized the Commission to raise former ceilings to higher "just and reasonable" levels. *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d at 994.

> purchaser—an intrastate pipeline, an interstate pipeline, a local distribution company served by an intra- or interstate pipeline, an end user, a non-profit consumer cooperative or what have you—without federal restrictions as to market entry, market exit or price attaching to the sale. Similarly, an independent marketer can acquire a portfolio of gas purchase agreements and sell gas supply to any person, again without coming under any market entry, market exit or price regulation over the sale. In short, with respect to sales of the commodity by producers or marketers, Congress removed controls in recognition of the competitive nature of the commodity market for gas.
>
> An interstate pipeline, however, seeking to sell gas from its system supply (a commingled stream of gas that was at the wellhead both NGA-jurisdictional and NGA-nonjurisdictional) is subject to the full panoply of statutory regulation governing market entry, market exit and price. . . .
>
> The rationale for maintaining utility-type market entry, exit, and price regulation over the sales for resale of interstate pipelines while removing that regulation for similar sales by other market entities is only implicit in the NGPA but appears plain enough: While Congress concluded that gas production was sufficiently competitive to remove regulation, the control which interstate pipelines exercised over transportation still conferred on them the same kind of market power over their customers as had existed at the time of enactment of the NGA.

Order No. 436, 50 Fed. Reg. 42,408, 42,418 (1985) (footnotes omitted).

Thus, interstate pipelines, like WNG, are still subject to pervasive regulation by FERC. For instance, pipelines must secure a certificate of convenience and necessity prior to performing any significant act—e.g., construction of new facilities or initiation of new transportation service or new sales for resale. 15 U.S.C. §717f(c). Pipelines also must obtain commission approval when they abandon any "certificated" facility, transportation or sale. 15 U.S.C. §717f(b). Additionally, the commission limits to "just and reasonable" levels the prices at which the interstate pipelines sell gas for resale or provide transportation services. 15 U.S.C. §717c(a).

During the natural gas shortage which occurred in the 1970s, pipelines were encouraged by the Commission to develop supply reserves and enter into long-term contracts with producers. The long-term contracts commonly incorporated high prices (and provisions for escalation upward) as well as "take-or-pay" provisions, requiring pipelines to either take some specified percentage of the deliverable gas, or to make "prepayments" for that percentage anyway. *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d at 995-96, 1021.

It was during this period of time that Williams Natural Gas acquired extensive new gas reserves from Amoco Production Company in the Wamsutter and Moxa regions of Wyoming, most of which contained high NGPA incentive prices. WNG was able to add this high-priced gas to its system and still sell it at a competitive price by "rolling in" the cost of the high-priced Wyoming gas with the cost of inexpensive "old gas" (e.g., from the Hugoton field) to reach a relatively low weighted average cost of gas (WACOG).

However, by 1982 the combination of a number of factors (including energy conservation, mild winters and lower prices of competing fuels such as petroleum) resulted in falling gas prices and a natural gas surplus. Further, var-

ious economic factors raised the wellhead price of gas. Producers of gas, responding to high prices and high take-or-pay terms, continued to develop new supply sources of gas. But since gas demand had fallen off, and the market could not absorb supplies at prevailing prices, a surplus of gas deliverability resulted. Thus, producers sought open access to pipeline transportation as an alternative to pipeline sales for marketing their gas. Moreover, purchasers of natural gas sought to purchase gas directly from the producer and have it transported in competition with the system supplies the pipeline retained under uneconomic long-term contracts. Finally, interstate pipelines, seeking new markets and lower prices for both surplus gas supplies and surplus pipeline capacity, expressed reluctance to provide transportation services to other suppliers, particularly where transportation of gas would displace the pipeline's own sales volumes, subjecting the pipeline to substantial take-or-pay exposure.

Order No. 436

In response to these conditions, FERC promulgated Order No. 436, 50 Fed. Reg. 42,408 (1985), (codified at various sections of C.F.R.). This order was motivated by the Commission's determination that the pipelines' refusal to transport gas for third parties had caused serious market distortions.

The essence of Order No. 436 is "a tendency, in the industry metaphor, to 'unbundle' the pipelines' transportation and merchant roles." *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d at 994. While Order No. 436 is a highly complex order, it basically imposes open access commitment on any pipeline that (1) secures a "blanket certificate" to provide gas transportation pursuant to §7 of the NGA, 15 U.S.C. §717f, or (2) actually provides transportation under §311 of the NGPA, 15 U.S.C. §3371. It further provides that if a pipeline holds itself out as a transporter of gas for others, the pipeline's LDC customers

then have an opportunity to convert their existing contract demand ("CD") from an obligation to purchase gas to an obligation to use (or pay for) transportation services.

In *Associated Gas Distributors v. F.E.R.C.*, 824 F.2d 981, the District of Columbia Circuit Court of Appeals upheld the substance of Order No. 436, but recognized that FERC had failed to deal with the problem of uneconomic take-or-pay contracts between pipelines and producers. Accordingly, the court remanded Order No. 436 to the Commission with the directive to determine to what extent certain policy considerations may justify the Commission's inaction on the uneconomical producer-pipeline contracts. 824 F.2d at 1030.

As has already been discussed, WNG commenced interim open access on December 23, 1986, in response to FERC's issuance of Order No. 436. By July, 1986, WNG had filed with FERC an Order 436 "Stipulation and Agreement" which detailed Williams' plans for a permanent open-access program. FERC approved Williams' stipulation and agreement on February 20, 1987, subject to substantial modifications and conditions. Williams found these conditions unacceptable, however, and began revising its stipulation and agreement. In October of 1987, a revised stipulation and agreement was distributed to WNG's customers and submitted for Commission approval. At this time, the Commission has still not approved WNG's permanent open-access proposals, and WNG is no longer operating under the interim open-access program.

Order No. 451

On June 6, 1986, FERC issued Order No. 451, 51 Fed. Reg. 22,168 (1986). Order No. 451 established procedures for the renegotiation of low, old, pre-NGPA gas prices and

the release of gas covered by such pre-NGPA gas purchase contracts. 18 C.F.R. §270.201 (1987).[3]

The commission issued Order No. 451 in an attempt to revise its methodology of regulating producer sales of "old gas" in response to changes in market conditions. The commission also recognized that the existing rate structure for old flowing gas had created at least three problems for natural gas consumers:

> First, the existing rates for most old gas are below the replacement cost of gas reserves. . . . Most producers of old gas are not receiving revenues equivalent to the marginal costs of replacing depleted old gas reserves, and gas reserves are being consumed faster than they are being replaced. . . .
>
> Second, the existing rates for old, flowing gas vary widely by vintage, based on the date of its dedication to interstate commerce. The overall prices consumers pay for gas depend directly on the access of their pipeline suppliers to these cheaper vintages of gas. Therefore, wide variations in pipeline access to old gas have created huge disparities in the prices consumers pay for gas at the burner-tip around the country. . . .
>
> Third, the pricing of old, flowing gas below replacement cost gives pipelines with large "cushions" of such gas the ability to "roll-in" their prices of new and deregulated gas with artificially low old gas prices. This allows the pipelines to effectively subsidize the prices of new and deregulated gas above what consumers would otherwise be willing to pay, and therefore frustrates

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[3] A case seeking review of Order No. 451 is currently pending before the Fifth Circuit Court of Appeals. *See Mobil Oil Exploration Co. v. F.E.R.C.*, Case No. 86-4940.

> the efficient working of competitive wellhead markets.

51 Fed. Reg. at 22,172.

Order No. 451 establishes a single alternative ceiling price for categories of "old gas" committed or dedicated to interstate commerce before enactment of the NGPA, and eliminates the various ceiling prices for different "vintages" of old gas previously set according to when the gas reserves were produced.

However, before a producer may collect a higher price for its old gas under an existing contract, it must first enter into what is known as a "good faith negotiation" ("GFN") process with the purchaser. Under the GFN process, a producer is permitted to abandon a contract only if the producer first seeks a higher price for its old gas, is unable to agree with the purchaser on a suitable price, and finds another purchaser. 18 C.F.R. §270.201(b) & (c) (1987). Further, if a tentative new purchaser is not a firm sales customer of the existing purchaser, and the existing purchaser is not an open-access transporter under Order No. 436, firm sales customers of the existing purchaser have a right of first refusal. 18 C.F.R. §270.201(g) (1987). Finally, interstate pipelines that are not open access transporters under the provisions of Order No. 436 will be granted blanket transportation certificates and will be deemed to have agreed to deliver on behalf of any shipper any gas released under this rule to any of its existing customers or interconnected pipelines. 18 C.F.R. §170.201(h) (1987). Thus, while pipelines will not become open-access transporters by virtue of such transportation, they may be obligated to transport gas to their own customers under certain conditions.

As for the instant case, testimony at hearing indicated that several producers have entered into or completed the GFN process with WNG, and "451 gas" released pursuant to those negotiations has been made available to the Cities

in at least three instances. Specifically, since June of 1987, Cabot Petroleum Corporation, Dakar Operating Company, and Mesa Petroleum have offered 451 gas to the Cities.

The Cities declined to accept the Cabot offer because it was for interruptible gas with prices and quantities to be renegotiable each month. The Dakar offer required the buyer to construct and maintain pipelines and meters at the wells located approximately 800 to 1,000 miles from Chanute. The Mesa proposal, which called for a price of $2.85/mcf, plus a transportation charge of $.52/mcf, was not acceptable to the Cities because it was "not competitive with Vesta." Finally, both Tenneco Oil Exploration & Production Company and Mobil Oil Corporation have entered into the Order No. 451 GFN process with WNG, but the process is not yet complete. Accordingly, the terms at which that gas will be offered to the Cities are not yet known.

Order No. 500

In response to the remand of Order No. 436 by the Court of Appeals in *Associated Gas Distributors*, the Commission issued Order No. 500 on August 7, 1987. Order No. 500 basically provides a crediting mechanism whereby pipelines which transport gas for producers under Order No. 436 may receive a credit against their obligations to take a similar volume of gas under take-or-pay contracts with those same producers.

There are, however, some situations in which pipelines must transport gas without credits. The most obvious situation occurs when the pipeline does not have a take-or-pay contract with the producer who owned the gas being transported by the pipeline. In such a case, there could be no credits because there would be no qualifying take-or-pay contract against which to apply any credits.

A second situation in which a pipeline must transport a producer's gas without credits occurs when a pipeline

transports gas which it previously purchased under a terminated take-or-pay contract, and which is not presently committed to the pipeline. For instance, if a producer-pipeline contract has been terminated under Order No. 451, no credits would be available to a pipeline which later transported the same producer's gas. However, for a contract to be considered terminated under Order No. 451, sales of all gas covered by that contract must have been abandoned or terminated under No. 451's GFN rule.

Conclusions of Law

Before a preliminary injunction may be granted, four prerequisites must be satisfied by the moving party. The movant must establish: (1) a showing that the movant will suffer irreparable injury unless the injunction issues; (2) proof that the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) a showing that the injunction, if issued, would not be adverse to the public interest; and (4) a substantial likelihood that the movant will eventually prevail on the merits. *Amoco Oil Co. v. Rainbow Snow, Inc.*, 809 F.2d 656, 661 (10th Cir. 1987); *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, 312 (10th Cir. 1985). Where the first three requirements for a preliminary injunction are satisfied, the Tenth Circuit has lessened the moving party's burden of proof on the fourth requirement. The court has held: " '[I]f the other elements are present . . . it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.' " *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980), (*quoting Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781-86 [10th Cir. 1964]). The function of a preliminary injunction is to preserve the status quo pending the outcome of the case. *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

thus, as a preliminary matter, the court must consider whether the grant of a preliminary injunction would preserve or upset the status quo.

Williams argues a preliminary injunction could only alter the status quo because Williams' pipeline is currently closed to transportation of third party gas and the plaintiffs seek to open the pipeline. The Cities point out, however, that Williams' pipeline was open until August 1, 1987, and the Cities, by filing the instant action, were only attempting to preserve the status quo as it existed prior to August 1, 1987. The court finds the Cities' argument persuasive, particularly in light of the fact the Cities filed this action on August 3, 1987, only two days after WNG had ceased open access.

Irreparable Harm

Perhaps the most important prerequisite for the issuance of a preliminary injunction is a showing that if the injunction is not granted, the movant will suffer "irreparable harm" before a decision on the merits can be rendered. 11 Wright & Miller, *Federal Practice and Procedure: Civil* §2948. A preliminary injunction will usually be denied if monetary damages are sufficient to compensate a plaintiff. *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d at 355; *Holly Sugar v. Goshen County Co-op. Beet Growers*, 725 F.2d 564, 570 (10th Cir. 1984).

The question of whether the Cities have suffered "irreparable injury" must focus on the Cities' long-term contracts with Vesta. The Cities' contentions with respect to this issue are simple and persuasive. When Williams closed its pipeline on August 1, 1987, each of the plaintiff cities had available a dependable, long-term source of gas at a substantially lower cost than the gas supplied by Williams. The Cities argue when Williams closed its pipeline, it effectively terminated the Cities' arrangements for such gas, and this loss constituted "irreparable injury" to the Cities.

Williams contends, however, the loss of the Vesta contracts cannot form the basis for the Cities' claims of "irreparable injury" because (1) three of the plaintiff cities had no long-term contracts in place at the time WNG closed its pipeline; and (2) the Cities' contracts with Vesta were "suspended" rather than "terminated" by WNG's closing of the pipeline.

WNG apparently concedes that the Edison/Vesta contract was for a long-term supply of gas, and that this gas was "earmarked" for the cities of Auburn, Humboldt, Iola and Osage City, Kansas and Cleveland, Oklahoma. WNG focuses instead on the cities of Chanute, Garnett and Neodesha, and argues these cities had no long-term contracts in place on August 1, 1987, and thus could not be irreparably harmed.

However, testimony at hearing showed that these three cities (Chanute, Garnett and Neodesha) were in the process of negotiating long-term contracts directly with Vesta when WNG closed its pipeline. For instance, Vesta's "letter agreements" with these three cities for the sale of "spot gas" in June and July of 1987 specifically noted that Vesta would flow the short-term gas to the Cities while the long-term agreements were being finalized. Moreover, Vesta's representative, David Tudor, testified that Vesta "fully intended to offer and enter into" a long-term gas sales contract with the cities of Chanute, Neodesha and Garnett and the essential terms of the agreement had been finalized (e.g., a five-year contract for the sale of gas at the rate of $1.45/mcf, adjusted according to 70% of WNG's sales service charge). Tudor further stated that the agreement was not actually entered into because it was uncertain how long Williams would keep its pipeline open. Thus, it is clear that had Williams not closed its pipeline, each of the plaintiff Cities would now have a supply of long-term, low price gas available through Vesta.

Williams asserts, however, that even if the court finds that each of the Cities had a long-term source of supply available through Vesta, the Cities cannot show that such contracts were lost as a result of Williams closing its pipeline. WNG notes that the Edison/Vesta contract (which was the source of supply for five of the Cities) contained a "force majeure" provision which arguably "suspended" rather than "terminated" the contract in the event the gas could not be transported over WNG's line. Thus, Williams reasons that should it decide at some indefinite point in the future to open access to its pipeline, the Vesta contract will, in effect, "pick up where it left off." Accordingly, Williams argues the Cities have not suffered irreparable injury because the contracts have not been terminated, and any loss suffered by the Cities will be compensable in money damages.

This argument is not supported by the evidence. First, the contract provision in question provides:

> 14.1 The term "force majeure" as used in this Gas Purchase Contract shall mean Acts of God, strikes, lockouts or other industrial disturbances . . . and causes of like or similar kind, whether herein enumerated or not, and not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.
>
> 14.3 It specifically is recognized and agreed by the parties hereto that the gas to be made available for sale and delivery by Seller which is purchased by Buyer hereunder may be transported by third party pipelines for Seller's account in order to effect delivery to Buyer at the delivery point(s). Accordingly, in addition to such other events of *force majeure* also shall exist when any third party pipeline is unable or otherwise de-

> clines to transport any volume of gas subject hereto during any period of time.

(Pltfs' Ex. 13, pp. 11-12.)

While it is clear that a pipeline's refusal to transport gas is a "force majeure" event under the contract, it is not clear from the contract the effect such an event has upon the parties' obligations to perform. It is probable that a determination of this question would require an examination of the entire contract and the intent of the parties as well as a consideration of the indefinite duration of the "force majeure" event in this instance. In any event, that question is not before this court. What is properly before the court is the testimony of Vesta's vice president, David Tudor, who stated that when WNG closed its pipeline, the gas which would have been sold to the plaintiff cities was resold on the spot market and transported over an open-access pipeline. Moreover, Tudor testified that if Williams' pipeline were to open again six months to a year after this case is tried on the merits, Vesta might not be willing to enter into a long-term gas purchase agreement with the plaintiff cities.

Tudor's testimony supports two findings: (1) the Cities' contracts with Vesta were effectively terminated when WNG closed its pipeline; and (2) if an injunction is not granted in this case, the Cities may lose the opportunity to contract with Vesta for a long-term, dependable supply of low cost gas.

This determination raises a final question with respect to this issue, e.g., can the loss of the Vesta contracts constitute "irreparable injury"?

A similar situation was addressed by the Tenth Circuit Court of Appeals in *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, and a brief discussion of that case is helpful here.

In *City of Chanute*, the plaintiffs were three cities which generated electric power through their own operation and distribution systems, and also purchased wholesale electric power from defendant Kansas Gas and Electric Company (KG&E). A dispute arose between the parties when the plaintiff cities attempted to contract with additional suppliers of electricity[4] and thus approached KG&E (which maintained the only transmission lines into the plaintiff cities) to arrange for the "wheeling" (or transfer) of the power. While KG&E was willing to wheel power to the cities, it would do so only on the condition that the cities would enter into new, higher priced contracts with KG&E for the purchase of wholesale power. When the cities refused to accept these conditions, KG&E refused to wheel power to them. 754 F.2d at 311-12. Plaintiffs subsequently filed an action against KG&E alleging violations of §§ 1 and 2 of the Sherman Act and of §3 of the Clayton Act.

The trial court granted plaintiffs' motion for a preliminary injunction requiring KG&E to wheel power to the cities pending the outcome of the suit, and in so doing found that all three cities would suffer irreparable harm if the injunction were not granted. *City of Chanute v. Kansas Gas and Elec. Co.*, 564 F.Supp. 1416 (D. Kan. 1983).

On appeal, the Tenth Circuit affirmed the district court's finding of irreparable harm as to the Cities of Chanute and Iola, but reversed that finding as to the City of Fredonia. The appeals court determined that because Chanute and Iola would lose their allotment of power without

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[4] The Cities of Chanute and Iola contracted with the Southwestern Power Administration (SWPA) and were to begin receiving five-year allocations of federally generated hydro-electric power on January 1, 1984. The City of Fredonia contracted with the Kansas Municipal Energy Agency to begin receiving power from the Nearman Creek Generating Plant on June 1, 1983, and was liable for demand charges whether or not the energy was transmitted. 564 F.Supp. at 1418.

wheeling, they suffered irreparable damages. The court reasoned:

> The difference in energy cost incurred by Chanute and Iola with and without SWPA power may be ascertainable, at least for the immediate future. *The value of the availability of potential supplier, however, cannot always be measured in dollars, particularly when, as here, such availability changes the competitive structure of the market and the supplier may be necessary to meet the long-term electrical demands of the cities.*

754 F.2d at 313 (emphasis added).

However, the court in *City of Chanute* distinguished Fredonia's situation on the ground that Fredonia's right to power from the Nearman Creek Project was not contingent on the issuance of the injunction. Rather, the court held that absent the injunction, the city "would merely be forced to pay for power it did not receive. This injury can be measured and compensated in dollars." 754 F.2d at 313.

The position of the plaintiff Cities in the instant case can be likened to that of Chanute and Iola in *City of Chanute*. For instance, unless an injunction is issued here, the Cities stand to lose a potential supplier of low-cost, long-term gas—a supply which may be necessary to meet the Cities' long-term gas needs. Moreover, it is difficult to estimate the effect of the loss of such gas on the Cities' customers—whether residential, commercial or industrial.

Williams contends that even if the Cities were to lose the Vesta supply of gas, the Cities would not be irreparably harmed because there are alternative supplies of gas available to the Cities at comparable or perhaps even better prices.

First, WNG cites the availability of 451 gas as an "alternative" source of gas to the Cities. WNG asserts that

"enough gas will be available to the Cities through the Order 451 GFN process to satisfy the Cities' combined peak day requirements 10 times over." (Def.'s Brief, p. 42.) Defendant's argument is misplaced. Plaintiffs have never suggested that there is not enough gas available to satisfy their needs. Rather, the issue is whether the Cities have been irreparably harmed by their inability to purchase low-cost, long-term gas from a dependable third party supplier and to have that gas transported over Williams' pipeline.

While it is true that if the Cities were to purchase 451 gas WNG would be required to transport the gas over its line, it is also true that the Cities have not yet received any offers for 451 gas comparable to the supply they can obtain from Vesta. Further, Order 451 provides that the producer need only offer the released gas to a pipeline's customers *after* the pipeline's offer has been rejected, and *after* an offer from a third party has been obtained. Therefore, it seems unlikely that the Cities will be able to obtain 451 gas comparable in price and term to that obtained through Vesta. In any event, as stated earlier, the 451 gas which has been offered to the Cities to date has been unacceptable either because of price or term or other conditions attached to the offer.

Defendant also suggests that in addition to the availability of 451 gas, the Cities have available substantial volumes of "local gas".[5] Defendant points out that the City of Chanute currently has a contract to purchase local gas from Chooch, Inc. and a pipeline from Chooch's wells to the City is nearly complete. Additionally, the City of Neodesha is currently connected to the local gas supply of

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[5] WNG's full requirements contracts with the Cities contain an exception which permits the Cities to purchase "local gas" from a third party without violating their full requirements contracts. While "local gas" may be defined in various ways, when used in this case it refers to gas reserves located in geographic proximity to the plaintiff Cities.

Willis Gas Company and has purchased some gas from Willis in the past.

The evidence showed, however, that the Chooch contract covered only a small percentage of Chanute's total requirements and was not contemplated to save the City's long-term needs. Moreover, the City of Neodesha is no longer purchasing gas from Willis because of quality problems experienced with Willis' gas in the past.

The evidence simply does not show that local gas of sufficient quality, price and volume is available to satisfy the needs of the Cities on a long-term basis. Further, even if the local gas did meet all of the necessary criteria, since Williams' pipeline is closed, the Cities in most instances would be required to construct pipelines from the gas reserves to the Cities. This is neither a feasible nor reasonable alternative.

The court therefore holds that the Cities have sufficiently shown that they will suffer irreparable injury unless the injunction issues.

Balance of Harms

Plaintiffs must next show that the threatened injury to plaintiffs outweighs whatever damage the proposed injunction may cause defendant. This element presents a difficult question, as both the Cities and WNG argue they will suffer injury if the court were to impose an injunction. However, for the reasons detailed below, the court finds the balance of hardships must weigh in favor of the Cities in this case.

The Cities point to the loss of an inexpensive, long-term gas supply, higher prices to customers and the potential loss of businesses and sales as evidence that the injury to the Cities, if the injunction is not granted, would outweigh any injury to the defendant if the injunction is granted. WNG maintains, however, the balance of harms must lie

in its favor because of the substantial take-or-pay exposure it would allegedly incur if the injunction is granted.

WNG, relying on §4(b) of the NGA, reasons that if the court orders WNG to open access to its pipeline to the plaintiff cities, Williams would subsequently be forced to open access to its pipeline on a system-wide basis.

Section 4(b) of the NGA provides:

> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any *undue* preference or advantage to any person or subject any person to any *undue* prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

15 U.S.C. §717c(b) (emphasis added).

Based on this statute, Williams argues FERC would not permit WNG to provide transportation service to the Cities alone, but instead would require that any service offered to the Cities be offered to all WNG customers on a non-discriminatory basis. Further, Williams estimates that under system-wide open access, transportation service would substantially displace gas sales and the company would be subject to take-or-pay exposure in the amount of $90 million to $140 million. WNG reasons that the injury to WNG in the form of take-or-pay exposure would outweigh the "small benefit" of reduced gas rates to the Cities.

Noting that §4(b) of the NGA prohibits only "undue" or "unreasonable" differences, the Cities argue that a difference in the treatment or services provided to WNG's customers would not by itself violate the NGA. *See Michigan Consol. Gas Co. v. Federal Power Commission*, 203 F.2d 895, 901 (3d Cir. 1953). Further, the Cities correctly

point out that this court has not been asked to open access to WNG's entire pipeline. Rather, the issue currently before this court is whether Williams maintains an intentional monopoly in the eight cities which are parties to this action, and whether the Cities are entitled to a preliminary injunction ordering WNG to open its pipeline to those cities.

Accordingly, the court concludes that an injunction ordering Williams to open its pipeline to the plaintiff Cities would result in only minimal take-or-pay exposure to the defendant, while a denial of the requested injunction may result in the loss to the Cities of a steady, assured supply of natural gas at a price far more reasonable than that presently assessed by Williams.

Public Interest

The issue of whether the injunction, if issued, would adversely affect the public interest requires an examination of the effect of an injunction on the customers of the Cities as well as the effect of an injunction on WNG's customers.

There can be no doubt that substantially lower wholesale gas prices would benefit, rather than adversely affect, the customers of the plaintiff Cities, as the Cities would pass the cost savings on to their retail customers.

WNG once again suggests that it will be exposed to substantial take-or-pay liability if the court grants the requested injunction, and it is likely that at least part of these costs will ultimately be passed on to all of WNG's customers, thereby adversely affecting the public interest.

As already discussed, such an argument improperly clouds the issue in this case. This court has not been asked to order open access to Williams' entire pipeline—or to, in effect, force Williams' compliance with Order No. 436. Rather, this court is here concerned only with whether WNG has an intentional monopoly in the eight plaintiff cities in violation of §2 of the Sherman Act. Moreover, as

this court commented in its ruling from the bench on this motion, it cannot be in the public interest for anyone to be forced to accept WNG gas at its present rate, knowing full well that such rate is not competitive in a real world setting.

Accordingly, the court finds the grant of the requested injunction would not adversely affect the public interest.

The final element plaintiffs must show is that they can demonstrate a likelihood of success on the merits.

As earlier stated, where the first three requirements are met, the moving party's burden of proof on the fourth requirement is lessened. Accordingly, plaintiffs will satisfy the fourth requirement if they raise questions going to the merits "so serious, substantial, difficult and doubtful" as to make them a fair ground for litigation and thus for more deliberate investigation.

In order to prevail on the merits, plaintiffs must prove the defendant has violated §2 of the Sherman Act. The offense of monopolization under §2 of the Sherman Act has two elements:

> (1) The possession of monopoly power in the relevant market; and
>
> (2) The willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); *see also Bright v. Moss Ambulance Service*, 824 F.2d 819, 823 (10th Cir. 1987); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). The Tenth Circuit has defined monopoly power as the ability to control prices and exclude competition. While the two elements are

closely related, both must be demonstrated to establish the existence of monopoly power. *Bright v. Moss Ambulance Service, Inc.*, 824 F.2d at 824 (*citing Shoppin' Bag of Pueblo, Inc. v. Dillon Companies, Inc.*, 783 F.2d 159, 164 [10th Cir. 1986]).

Plaintiffs seek to prove liability under §2 by utilizing the "essential facilities" or "bottleneck" doctrine. Under this doctrine, a business or group of businesses which control a scarce facility has an obligation to give competitors reasonable access to it. *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 856 (6th Cir. 1979). The bottleneck theory differs from traditional monopolization analysis in that the intent factor is de-emphasized and emphasis is placed instead on the surrounding market conditions. Kintner, Federal Antitrust Law §10.25 n. 484 (1980) Further, the doctrine is particularly applicable to natural gas pipelines and their refusal to transport third party gas. McNulty, *Freeing the Captives: Nondiscriminatory Access to Transportation in the Interstate Gas Market*, 47 U. Pitt. L. Rev. 843 (Spring 1986).

The Tenth Circuit Court of Appeals recently discussed and applied the doctrine in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509. The court there defined the four elements necessary to establish liability under the essential facilities doctrine as follows:

> (1) Control of the essential facility by a monopolist;
>
> (2) A competitor's inability to duplicate the facility;
>
> (3) Denial of the use of the facility to a competitor; and
>
> (4) The feasibility of providing the facility.

738 F.2d at 1520 (*quoting MCI Communications v. AT&T*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)).

Prior to discussing the application of each of the above elements, a preliminary issue must first be addressed. Specifically, plaintiffs contend that when the "essential facilities" doctrine is utilized, proof of its elements is proof of monopoly power, and plaintiffs need not show "the relevant market". Defendant, on the other hand, argues proof of the relevant market is always a threshold element in determining whether there has been a violation of §2 of the Sherman Act.

In support of its contention, defendant cites *Consul Ltd. v. Transco Energy Co.*, 805 F.2d 490 (4th Cir. 1986). In *Consul*, as in the instant case, plaintiff urged the court to find that under the "essential facilities" doctrine, the court need not concern itself with market definition. The Fourth Circuit Court of Appeals, after reviewing a number of "essential facility" cases, ruled that the relevant market must be proven regardless of the type of §2 claim utilized by plaintiff. 805 F.2d at 494.

Conversely, plaintiffs contend market analysis is not an indispensable means of proving monopoly power. Plaintiffs cite *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), in support of their contention. In *Woods*, owners of wells in the Appling Field in Texas filed an antitrust action against other producers, contending the defendants possessed monopoly power over the extraction of gas from the Appling Field, and that the relevant area of competition was the field. The court held:

> "When one must look for a monopoly, determining a relevant market in which to look and in which to evaluate competitive effects is obviously an essential first step. But when, with an illegal practice such as is present here in mind, one can look at an area and see the existence of monopoly power, not by inference from market share, but by determining actual ability to exclude compe-

> tition and control prices, there appears no real need to go further."

438 F.2d 1306 (*quoting Denver Petroleum Corp. v. Shell Oil Co.*, 306 F.Supp. 289 [D. Colo. 1969]).

The *Woods* court, however, then went on to find that the Appling Field was the relevant market and to determine that the defendant possessed monopoly power in that field. Hence, the *Woods* case does not stand for the proposition advanced by plaintiffs here.

The court thus holds the existence or absence of monopoly power cannot be determined in a vacuum but rather must be measured within a defined market. 3 Von Kalinowski, Antitrust Laws and Trade Regulation §8.02[2] (1986). While it is certainly true that under the "essential facilities" doctrine, analysis of the relevant market may not take on the same implications as it does in other cases, this court concurs with the *Consul* court's determination that the "relevant market" must be proven in every case.

Determining the relevant market typically requires an inquiry into the nature of the product and the geographical area of effective competition. The relevant product market is generally defined to be that area of goods or services in which the product or products offered by the defendant effectively compete while the relevant geographic market is generally defined to be the geographic area of effective competition in which the product or services is traded. *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 388, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).

With that stated, the court finds the relevant product market in this case is natural gas. It has not been shown that there is an adequate substitute for natural gas that would be acceptable to the large majority of industrial, commercial, or residential consumers of the Cities. Nor has it been shown that sufficient interchangeability exists between gas and other sources of energy. As for the rel-

evant geographic area, it is clear to the court that while Williams Natural Gas Company operates in a several state geographic area, the plaintiff Cities can practicably turn to supplies only through Williams. Thus, the court concludes the relevant geographic market in this case is the area encompassing the plaintiff Cities.

With this determination of the relevant market in mind, the court now moves on to a consideration of whether this case satisfies the elements of the "essential facilities" doctrine.

The first element, control of the essential facility by a monopolist, has been met here. WNG owns the only natural gas pipeline connected to the plaintiff Cities and also maintains complete control over that pipeline. If WNG refuses to transport third party gas to the Cities, the Cities simply cannot compete for or obtain such gas.

The second element requires a showing of the competitor's inability to duplicate the essential facility. This element must be broken down into two questions for purposes of the court's analysis: (1) do the Cities compete with WNG; and (2) can the Cities duplicate the essential facility?

The essential facility doctrine is applicable only where the firm which controls the essential facility refuses to allow access to the facility to a competitor. *Olympia Equip. Leasing v. Western Union Telegraph*, 797 F.2d 370, 376-77 (7th Cir. 1986); *MCI Communications v. AT&T*, 708 F.2d at 1147 n. 100. Thus, Williams reasons that the Cities in this case are "customers" rather than "competitors" of WNG and cannot utilize the essential facility doctrine.

The Cities do not attempt to argue that competition exists between Williams and the Cities for retail customers. Rather, the Cities point out that Williams directly serves a number of industrial customers within and around the Cities—customers the Cities could potentially serve if the Cities could obtain lower priced gas.

WNG counters that direct sales to end users comprise only about 16% of its total sales. Further, WNG's president and vice president testified at the hearing that WNG has always viewed the Cities as customers rather than competitors.

Regardless of how small a percentage of WNG's business consists of direct sales, and regardless of how WNG views the plaintiff Cities, the court finds the Cities do compete to some degree, with WNG for direct sale customers. Moreover, there is no question that by denying access to its pipeline to Vesta and other potential suppliers, WNG has foreclosed competition and prevented the plaintiff Cities from obtaining competitively priced gas. Thus, the court finds plaintiffs are entitled to utilize the essential facility doctrine.

Plaintiffs must next show that they are unable to "duplicate" the essential facility. This element does not require plaintiff to show that it would be impossible to duplicate the facility or that the facility is indispensable. Rather, it is sufficient if duplication of the facility would be economically infeasible, and if denial of its use would inflict a severe handicap on potential market entrants. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 539-40 (7th Cir. 1986); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Consolidated Gas Company of Florida, Inc. v. City Gas Company of Florida*, 665 F.Supp. 1493, 1534 (S.D. Fla. 1987).

While conflicting evidence was presented at hearing regarding the cost to the Cities of constructing a four-inch pipeline (estimates range from $10,000/mile to $50,000/mile), the court finds that constructing such a pipeline is neither feasible nor required.

Defendant additionally suggests that the fact that two cities are currently connected to local gas supplies is evidence that the Cities are able to duplicate defendant's facility.

In *MCI Communications v. AT&T*, 708 F.2d at 1147, the court, faced with an analogous situation, held that the fact that MCI was building its own facilities in at least one area was not evidence that it could duplicate AT&T's local service facilities at every point. Similarly, in this case the evidence does not show that each of the plaintiff Cities is capable of constructing a pipeline to local gas supplies. More importantly, the evidence does not show that even if such pipelines were built that local gas supplies would be of the same quality, dependability or price as could be obtained through access to Williams' pipeline. The court therefore finds that plaintiffs are unable to duplicate the essential facility.

Thirdly, the Cities must show denial of use of the facility to a competitor.

WNG argues it has not denied use of the pipeline to the Cities because it continues to supply gas to them through its pipeline, and further, because WNG is required to transport 451 gas to the Cities if they should contract for such gas with the producer. As previously discussed, 451 gas has not been shown to be available to the Cities on a long-term, low-cost basis. Moreover, while WNG continues to provide the Cities with its own gas, it has denied the Cities the opportunity to use the facility to purchase third party gas. Accordingly, the court finds the third element has also been met.

Finally, the Cities must show it is feasible for WNG to provide its facility to the plaintiffs.

WNG has contended throughout these proceedings that it cannot feasibly open access to its pipeline because to do so would result in substantially reduced sales and increased take-or-pay exposure.

First, the court has already determined that if it were to order open access only to the eight plaintiff Cities, minimal or no take-or-pay exposure would be incurred by

defendant. Further, WNG would continue to receive a transportation fee in exchange for transporting third party gas to the Cities.

Secondly, even if take-or-pay exposure was incurred by the defendant as a result of this court's order, the "justification of self-preservation" has not been successfully asserted as a defense to denial of access to an essential facility. *Consolidated Gas Company of Florida v. City Gas Company of Florida*, 665 F.Supp. at 1536. A similar argument to that made by the defendant here was made in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). In *Otter Tail*, an electric power company was held to have violated §2 of the Sherman Act by monopolizing and attempting to monopolize the retail distribution of electric power in its service area by attempting to prevent communities in which its retail distribution franchise had expired from replacing it with a municipal distribution system. The power company argued that if it did not prevent the establishment of municipal electric systems, more and more municipalities would turn to public power and the company would go downhill. The Supreme Court held:

> The argument is a familiar one. It was made in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L Ed 2d 1249, 87 S Ct 1856, a civil suit under § 1 of the Sherman Act dealing with the restrictive distribution program and practices of a bicycle manufacturer. We said: "The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct." Id., at 375, 18 L Ed 2d 1249.
>
> The same may properly be said of § 2 cases under the Sherman Act. That Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collides

> with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.

410 U.S. at 380 (footnote omitted).

Accordingly, the court finds the defendant cannot rely on the threat of take-or-pay exposure as a defense to the Cities' antitrust claim. The Cities have shown it is feasible for WNG to provide its facility to plaintiffs.

Plaintiffs have thus established the likelihood they will prevail on their "essential facility" claim and have raised questions going to the merits "so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." With this determination made, plaintiffs have satisfied each of the requirements necessary to obtain a preliminary injunction.

IT IS ACCORDINGLY ORDERED this 5th day of February, 1988, that plaintiffs' motion for preliminary injunction is granted. Defendant is ordered to open access to its pipeline to the eight plaintiff Cities for the transport of third party gas. The Cities are thus advised to formalize their respective contracts for the purchase of gas from Vesta. Once such contracts are in place, the Cities will have waived their present contracts with Williams and any rights or claims that may exist under those contracts.

A status conference is scheduled in chambers on February 26, 1988, at 1:00 P.M.

MEMORANDUM ORDER

On Motion to Modify

Defendant Williams Natural Gas Company ("WNG") has filed a motion to modify in two respects the preliminary injunction entered herein on February 5, 1988. The court has reviewed Williams' brief with attachments, being an emergency application for temporary and permanent certifications of public convenience and necessity by the Federal Energy Regulatory Commission ("FERC"). Ironically, WNG seemingly represents to FERC that it intends to appeal this court's order of February 5, 1988, and seek a stay of its implementation before the Tenth Circuit Court of Appeals.

Notwithstanding, Williams seeks recasting of this court's order to enable the parties to perform certain predicate acts as follows:

> A. Direct each plaintiff electing to receive relief under the injunction to furnish WNG by a date certain with the data, documents and information required by law (18 C.F.R. § 157.5 *et seq.*) for a complete filing with the Federal Energy Regulatory Commission ("FERC") seeking regulatory authority to transport third-party natural gas in interstate commerce pursuant to § 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(c), and corresponding abandonment of existing sales service under § 7(b) of the NGA, 15 U.S.C. § 717f(b);
>
> B. Permit WNG a reasonable time (at least until the status conference set for February 26, 1988) within which (a) to supplement and complete the NGA § 7 application, (b) to complete and deliver the appropriate transportation agreements to the electing plaintiffs for execution, and (c) to receive from the electing plaintiffs the com-

pleted documentation and required data in order for WNG to file the same promptly with the FERC as a supplement to the NGA § 7 application; and

C. Grant WNG and the electing plaintiffs a reasonable time to obtain from the FERC emergency approval of the NGA § 7 application, during which period the injunction shall be suspended until the FERC acts so long as the parties diligently pursue the matters set forth above.

In the court's view, the referred requisites are those contemplated and implied by the findings and directive in the February 5, 1988 order. However, the effect of the court's directive and its implementation need not be stayed in the process.

Next, WNG seeks limitation of the transport and distribution of third party gas to the cities, asserting that the order should only apply to direct sale industrial customers now served by WNG or potential customers served by the Cities, and no other.

In this regard, given the findings, it is this Court's intention that the Cities are at liberty to timely contract for third party gas to be transported by WNG in sufficient quantums to serve all of the Cities' present customers, i.e., industrial, commercial and/or residential.

IT IS ACCORDINGLY ORDERED this 9 day of February, 1988, that defendant Williams Natural Gas Company's motion to modify preliminary injunction is overruled.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 90-3273; 90-3313 & 90-3369

CITY OF CHANUTE, KANSAS; CITY OF AUBURN, KANSAS; CITY OF CLEVELAND, OKLAHOMA; CITY OF GARNETT, KANSAS; CITY OF HUMBOLDT, KANSAS; CITY OF IOLA, KANSAS; CITY OF NEODESHA, KANSAS; CITY OF OSAGE, KANSAS,

Plaintiffs, Appellants,

v.

WILLIAMS NATURAL GAS COMPANY,

Defendant, Appellee.

ORDER
Entered March 27, 1992

Before McKAY, Chief Judge, BARRETT, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having re-

quested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

By Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

No. 91-2066

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF CHANUTE, KANSAS, *et al.*,
Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the court of appeals correctly held that the provision of regulated natural gas sales and transportation service by the Respondent to Petitioners defeats their claims under the "essential facilities" doctrine of Sherman Act § 2, and whether that holding is fully consistent with prior opinions of this Court and the other courts of appeals.

II. Whether this Court should deny certiorari on the Petitioners' "tying" claim under Sherman Act § 1 since the undisputed facts presented below demonstrate that they cannot prove at least one element of that claim.

III. Whether the court of appeals correctly concluded that Respondent's efforts to avoid millions of dollars in contract liability constitutes a legitimate business reason for the conduct sued upon, and whether that conclusion is fully consistent with prior decisions of this Court.

IV. Whether the issues raised in the petition for writ of certiorari are not sufficiently important for this Court's review because they will not likely be repeated, thereby making further adjudication in this case important only to the parties and not to the general public.

RULE 29.1 LISTING

Respondent Williams Natural Gas Company is a wholly-owned subsidiary of The Williams Companies, Inc. Other subsidiaries of The Williams Companies, Inc. which are not wholly-owned by that corporation are as follows:

Apco Argentina, Inc.

Kern River Gas Supply Corporation

Kern River Service Corporation

Kern River Gas Transmission Company

Texasgulf, Inc.

Interconnect Acquisition Corporation

Facilities Communications International

Northern Border Pipeline Company

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Williams Natural Gas Company ("WNG"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit in this case. The opinion below is published at 955 F.2d 641 (10th Cir. 1992).

AUTHORITIES INVOLVED

Petitioner omitted the following statutory provisions involved in this proceeding:

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c, provides in pertinent part as follows:

> (c) . . . [E]very natural-gas company shall file with the [Federal Energy Regulatory] Commission . . . schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

Section 7 of the Natural Gas Act, 15 U.S.C. § 717f, provides in pertinent part as follows:

> (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission . . . .
>
> (c) No natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: . . . .

Section 311 of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3371, provides in pertinent part as follows:

(a) . . . (1) . . . (A) In general.—The Commission may, by rule or order, authorize any interstate pipeline to transport natural gas on behalf of—

(i) any intrastate pipeline; and

(ii) any local distribution company.

STATEMENT OF THE CASE

Aside from the gross overstatement of the import of the Court of Appeals' ruling as a "sweeping immunization" from the antitrust laws for the interstate natural gas pipeline industry, the principal flaw in the Cities'[1] petition is that it wholly ignores the business and regulatory context of WNG's actions. The Cities acknowledge the existence of the pervasive regulatory regime in which WNG must operate its business, but dismiss it nonchalantly by stating that "[t]his case involves, but is not constrained by, the relationship between the antitrust laws and a federally regulated industry." (Petition at 4).

WNG has never advocated in this case that the regulatory regime under the Natural Gas Act ("NGA") and the Natural Gas Policy Act of 1978 ("NGPA") "immunizes" WNG from the antitrust laws, as the Cities so often repeat, nor has any court so held. (*See* 955 F.2d at 656, Petition App. 24a). What WNG has advocated is that the federal regulatory regime is an integral part of the market conditions of the interstate natural gas industry and, as a result, this case must be judged against the backdrop of federal regulation and its effect on both WNG's and the Cities' behavior.[2] The law requires precisely such an analysis. *See United States v.*

[1] The Petitioners will be referred to herein collectively as "the Cities."

[2] The Cities actually admit the close interplay of the antitrust laws and the federal regulatory scheme for interstate natural gas pipelines by their acknowledgement that when the regulatory process at issue in this case was complete and WNG became a certificated open-access transporter under § 7 of the NGA, the preliminary injunction they had obtained under the antitrust laws (and which was stayed by the Tenth Circuit) became "moot." (Petition at 10).

Marine Bancorporation, 418 U.S. 602, 627 (1975); *Silver v. New York Stock Exchange*, 373 U.S. 341, 360-61 (1963); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1105-06 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

> The more general point is that antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.

1 Areeda, Turner, *Antitrust Law* § 223d (1978).

The lower courts followed that law in this case, as did the courts in *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, —— U.S. —— (1992), an analogous antitrust case brought against an interstate natural gas pipeline in nearly identical regulatory and business circumstances. Properly viewed, therefore, the lower court decisions are entirely correct and fully consistent with all apposite prior decisions, and the Cities present no issue worthy of this Court's limited time and resources.

Regulatory and Historical Background

Like virtually all interstate natural gas pipelines, WNG has through most of its history purchased natural gas at the wellhead and transmitted the gas to markets where the gas was resold, mostly to local distribution companies ("LDCs") who in turn resold it to residential and industrial end users. In this so-called "merchant function," the pipeline was principally a seller, not a transporter, of the gas. There was virtually no demand for transportation service by itself before the mid-1980s, and few pipelines even had general application rate schedules providing for such service.[3]

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[3] The background of the interstate natural gas industry has been the subject of many judicial decisions, and the Court is referred to

Commencing with the passage of the NGA in 1938, 15 U.S.C. § 717 *et seq.*, virtually every aspect of an interstate pipeline's business, from the original purchase price paid to the producer to the end-product sale price to the LDC, including commencement and termination of service and the terms and conditions of the service provided, was closely regulated—first by the Federal Power Commission ("FPC") and later by the Federal Energy Regulatory Commission ("FERC"). Under the NGA, each and every transaction for the transportation or sale of gas for resale required the pipeline to obtain a certificate of public convenience and necessity from the FPC or FERC. NGA § 7, 15 U.S.C. § 717f. The NGA also prohibits pipelines from unduly discriminating among customers in the price or terms of service. NGA § 4, 15 U.S.C. § 717c.

This system of regulation worked fairly well for several decades and resulted in nationwide expansion of the availability of natural gas to consumers at low prices relative to the cost of competing fuels. But by the early 1970s it became clear that the artifically low wellhead price limits imposed by FPC regulation were inhibiting the production of sufficient volumes of gas to meet rising demand, and a severe national shortage of gas deliverability to the interstate market developed in the 1970s and early 1980s.[4]

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the excellent discussions in the following cases: *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, — U.S. —, 111 S. Ct. 615 (1991); *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988); *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, — U.S. — (1992).

[4] The FPC began regulating the price charged by producers at the wellhead after this Court's decision in *Phillips Petroleum Co. v. State of Wisconsin*, 347 U.S. 672 (1954). Traditionally, the interstate wellhead price set by the FPC was cost-based, not market-based, and consequently was below the price that *intrastate* pipelines and other unregulated purchasers were able to offer, thereby resulting in short supplies to consumers served by *interstate* pipelines. *See Mobil Oil Exploration & Producing Southeast, Inc. v.*

The shortage created intense competition for wellhead purchases of gas, but the price of gas to the interstate market was still regulated by the FPC, thus eliminating price as a bargaining point. Instead, producers began demanding, and pipelines were forced to accept, onerous non-price contract terms—long contract commitments, as long as twenty years, and high take-or-pay provisions requiring the pipeline to purchase or pay for as much as 95 to 100 percent of a well's annual deliverability.[5]

In an effort to eliminate the deliverability shortage, in 1978 Congress enacted the NGPA, which phased-in deregulation of wellhead purchases of natural gas. 15 U.S.C. § 3301 *et seq.* The NGPA established price ceilings for various categories of new natural gas production which were significantly higher than previous regulated rates, and because producers were still in a vastly superior bargaining position over interstate pipelines, in most cases the NGPA's ceilings ended up being the contract price for gas covered by the NGPA. The net result was that by 1982, WNG, like most interstate pipelines, was committed under a significant number of 20-year gas purchase contracts with high prices and high take-or-pay requirements.

In time, the NGPA accomplished its purpose and substantial new reserves were committed to the interstate gas market, albeit at significantly higher prices. In 1984 and 1985, however, demand for natural gas began a precipitous decline due to a combination of causes, including the NGPA-induced higher prices, political events in the Middle East resulting in a sharp drop in the price

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United Distribution Cos., — U.S. —, 111 S. Ct. 615, 619-620 (1991); *Blanco Oil Co. v. FERC*, 598 F.2d 152, 155 (D.C. Cir. 1979).

[5] A take-or-pay provision in a contract requires a purchaser to pay for a stated quantity of gas whether or not that gas is actually purchased. *See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409, 412 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565-66 (10th Cir. 1989); *Universal Resources Corp. v. Panhandle Eastern Pipe Line Co.*, 813 F.2d 77, 80 (5th Cir. 1987).

of competing supplies of oil, and the general economic recession. Consequently, the gas shortages of the 1970s became a gas deliverability glut in the 1980s as supplies came to greatly exceed demand. Once again, however, the interstate gas market was grossly distorted because so much of pipelines' supply reserves were committed under long-term, high-priced, take-or-pay contracts.

In response to this crisis the FERC began a checkered series of initiatives, many of which were reversed or remanded by the courts of appeals, which created an ever-changing regulatory landscape through which interstate pipelines like WNG were required to navigate. First, the FERC implemented "special marketing programs" designed to move lower-cost excess deliverability to those customers most likely to switch to alternative fuels at competitive prices, usually industrial end-users, but these programs were reversed in *Maryland People's Counsel v. FERC*, 761 F.2d 768 (D.C. Cir. 1985), 761 F.2d 780 (D.C. Cir. 1985), and 768 F.2d 450 (D.C. Cir. 1985).

In response to the legal demise of the special marketing programs, the FERC next proposed to radically alter interstate pipelines' historical role as merchants of gas to make them primarily gas transporters by a new "open-access" regulatory initiative announced in FERC Order No. 436, 50 Fed. Reg. 42,408 (1985).

> Order [No. 436] envisages a complete restructuring of the natural gas industry. It may well come to rank with the three great regulatory milestones of the industry: the passage of the Natural Gas Act in 1938, the imposition of price controls on independent producers' wellhead sales under *Phillips Petroleum Co. v. Wisconsin*, and adoption of the Natural Gas Policy Act in 1978.

Associated Gas Distributors v. FERC, 824 F.2d 981, 993 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (citations omitted) (hereinafter "*AGD*"). Order No. 436 and the regulations it put in place permit interstate pipelines which voluntarily offer transportation services to

obtain a "blanket certificate" under NGA § 7 permitting the provision of transportation without individual FERC approval, but only on a non-discriminatory, system-wide basis. 18 C.F.R. §§ 284.8, 284.9. As the court noted in *AGD*, however, when the FERC took this monumental step, it largely ignored the baggage hanging over from an earlier era—the billions of dollars in take-or-pay exposure the pipelines faced if they suddenly were no longer selling (and hence not buying) gas. *AGD*, 824 F.2d at 1021-30.

Although *AGD* largely affirmed the basic transportation program adopted in Order No. 436, it reversed significant portions of the order because of the FERC's failure to come to grips with the industry's serious take-or-pay problems. That reversal resulted in FERC Order No. 500, 52 Fed. Reg. 30,334 (1987), which addressed some of the take-or-pay concerns on an interim basis, but it too was remanded for the FERC to reconsider various aspects of the order, including take-or-pay. *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989).

During the pendency of its Order Nos. 436 and 500 transportation initiatives, the FERC also promulgated Order No. 451, 51 Fed. Reg. 22,168 (1986), purportedly to increase the supply of spot market gas available for sale to LDCs like the Cities. That order established a so-called "good faith negotiation" procedure which allowed producers of lower-priced, pre-NGPA gas to demand that pipelines renegotiate the price in those older contracts upward to a much higher ceiling price. 18 C.F.R. § 270.201. If the pipeline did not agree to pay the higher price, the producer could elect to consider the gas abandoned and could sell it elsewhere. Since the ceiling price, and therefore the price usually demanded under the "good faith negotiation" procedure, was much higher than market rates, the effect of Order No. 451 was to cause pipelines to lose a significant volume of low-priced gas which they had been using to moderate the expensive post-NGPA gas they were required to purchase or pay for

under take-or-pay contracts in arriving at a lower weighted average cost of gas to consumers.

In addition, if a pipeline was not an open-access transporter under an NGA § 7 certificate when gas was abandoned under FERC Order No. 451, the order required the producer to provide a right of first refusal to all the firm sales customers of the pipeline (including the Cities) before selling it to a new purchaser. Order No. 451 also required the pipeline to transport the gas to any buyer also a firm sales customer of the pipeline. 18 C.F.R. §§ 270.201(g) and (h). After Order No. 451 was in effect for more than three years, and many pipelines including WNG had attempted to reorder their affairs accordingly, it was reversed in *Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, 885 F.2d 209 (5th Cir. 1989), but later reinstated by this Court. *Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, —— U.S. ——, 111 S. Ct. 615 (1991).

Throughout this regulatory disarray, the FERC consistently paid little or no attention to the fall-out remaining after the gas deliverability shortage was long gone—the mounting take-or-pay problems confronting the entire industry. *See AGD, supra; Mobil, supra; Consolidated Edison Co. of New York, Inc. v. FERC*, 823 F.2d 630 (D.C. Cir. 1987).

The Events Leading Up to This Case

The Cities had been full-requirements customers of WNG since as early as 1947. (*See* 743 F. Supp. at 1451, Petition App. 60a). From its commencement, WNG's sale for resale service to the Cities was governed not only by the requirements contracts between the parties, but also by the NGA § 7 certificates of public convenience and necessity issued by the FPC authorizing that service, and by WNG's FPC/FERC-approved tariff, which was expressly incorporated into the contracts. Under the tariff, the contracts automatically renewed every five years unless either party gave written notice of termination in the manner provided in the tariff. (*See* 1990-91 Trade Cas.

¶ 68,967 at 63,196, Petition App. 95a). The contracts, certificates and tariff required WNG to supply, and the Cities to purchase, the entire gas supply requirements of the Cities' distribution systems.[6] (*See* 678 F. Supp. at 1519, Petition App. 126a). This mode of service governed WNG's relationship with the Cities, and indeed with most of WNG's customers, until 1987-88.

After the promulgation of FERC Order No. 436, WNG promptly initiated the complicated and difficult process of converting its operations from those primarily of a gas merchant to a combination gas merchant and transporter. On July 18, 1986, WNG filed a Stipulation and Agreement ("S&A") at the FERC which had been negotiated with WNG's major customers, potential shippers, state regulatory commissions, and the FERC staff, thus beginning the regulatory procedure to obtain approval of an Order No. 436 blanket certificate for "permanent" open-access transportation operations pursuant to NGA § 7. (*See* 743 F. Supp. at 1452, Petition App. 63a.). The S&A would have permitted WNG's customers to begin receiving transportation service on a phased-in basis, as was contemplated in Order No. 436, and would have provided mechanisms to ameliorate the take-or-pay impact on WNG and its customers.

Anticipating that regulatory approval of the S&A would not be long in coming, WNG initiated an "interim" open-access program on December 23, 1986, pursuant to § 311 of the NGPA, 15 U.S.C. § 3371.[7] (*See* 1990-91

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[6] The Cities' contracts and WNG's tariff also permitted the Cities to purchase a limited amount of "local gas," and a few of the Cities took advantage of that option. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,197, Petition App. 98a).

[7] NGPA § 311 permits the FERC to authorize interstate pipelines to provide transportation service on behalf of an intrastate pipeline or local distribution company without the need of a certificate issued by FERC under the NGA. 15 U.S.C. § 3371. Section 311 transportation is self-implementing and allows the pipeline to begin and end the transportation without prior FERC approval. After

Trade Cas. ¶ 68,967 at 63,198, Petition App. 100a). To permit the Cities and other customers to purchase gas from third parties, WNG temporarily waived its sales customers' contractual purchase obligations during the interim program, and obtained from the FERC a temporary waiver of the corresponding requirements provision in its FERC Tariff. 36 F.E.R.C. (CCH) ¶ 61,371 (1986). Those waivers temporarily relieved the Cities of the obligation to purchase any portion of their requirements from WNG, but did not relieve WNG of the obligation to stand ready to serve the Cities' full requirements on demand, nor did it provide any take-or-pay protection to WNG. The Cities, like all customers, shippers, and producers on WNG's system, were informed that the interim program and WNG's voluntary waiver of customer purchase obligations would continue only until May 1, 1987. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,198, Petition App. 100a).

The FERC approved the S&A in February, 1987, but with significant modifications which eliminated much of the take-or-pay protection built into it. *Northwest Central Pipeline Corp.*, 38 F.E.R.C. (CCH) ¶¶ 61,215; 61,169; 61,170; 61,171 (1987).[8] Because implementing open-access under the FERC-modified S&A would have presented an unacceptable risk of take-or-pay exposure, WNG declined to accept the certificate. (*See* 743 F. Supp. at 1453, Petition App. 63a-64a). Nevertheless, WNG continued with the interim open-access program and immediately began negotiating a Revised Stipulation and Agreement ("RS&A") in the Spring of 1987. (*See* 743 F. Supp. at 1456, Petition App. 70a-71a). During the interim program, as more and more sales customers replaced gas purchased from

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Order No. 436, section 311 transportation had to be "open-access" and could be provided or terminated only in a system-wide manner. *ANR Pipeline Co.*, 39 F.E.R.C. (CCH) ¶ 61,341 (1987).

[8] WNG was formerly named Northwest Central Pipeline Corporation, and before that, Cities Service Gas Company. The abbreviation "WNG" is intended to mean the company under any of these names.

WNG with cheaper gas transported by WNG but purchased from third parties, WNG experienced increasing difficulties in managing its own purchases to satisfy the take-or-pay purchase obligations in gas supply contracts with producers. (*See* 743 F. Supp. at 1453, Petition App. 64a).

By obtaining short-term waivers of take-or-pay liability from its principal supplier, WNG was able to extend the interim program until August 1, 1987, and likewise extended the temporary waiver of the Cities' and other customers' contractual purchase obligations. (*See* 743 F. Supp. at 1453, Petition App. 64a). However, two important take-or-pay considerations became apparent to WNG in late July, 1987—(1) the regulatory approval process for permanent open-access transportation operations under a blanket NGA § 7 certificate, on terms which meaningfully addressed WNG's take-or-pay exposure, was going slower than anticipated, and (2) WNG's principal supplier would not agree to further short-term take-or-pay waivers, without which WNG estimated its take-or-pay exposure could surpass $100 million if the interim program continued another year. (*See* 743 F. Supp. at 1454, Petition App. 67a-68a).

On August 1, 1987, after due notice to all customers, including the Cities, the interim open-access program ended and the requirements provisions of WNG's contracts with the Cities again became operative. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,197-200, Petition App. 100a-107a). Almost one year later, FERC approved the RS&A by a final order issued on July 5, 1988, 43 F.E.R.C. (CCH) ¶ 61,227 (1988), and accepted WNG's revised tariff on July 19, 1988, 44 F.E.R.C. (CCH) ¶ 61,145 (1988). On the following day, WNG accepted the NGA § 7 blanket certificate and began providing open-access transportation thereunder. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,195, Petition App. 93a). The Cities began taking all of their gas requirements from third parties on August 5, 1988. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,195, Petition App. 94a). During the approximately one-year "closed" period

that WNG did not offer open-access transportation (August 1, 1987 to July 20, 1988), three of the Cities (Osage City, Iola, and Auburn) were fully obligated by contract to purchase from WNG all of their gas requirements, except for the gas they purchased from Order No. 451 gas suppliers, and three other Cities (Chanute, Humboldt, and Neodesha) were so obligated until April 22, 1988. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,196, Petition App. 95a).

As firm sales customers of WNG, the Cities received numerous offers to sell gas from Order No. 451 producers under the FERC's regulations which provided the Cities and other firm sales customers with a right of first refusal to purchase the gas. (*See* 1990-91 Trade Cas. ¶ 68,967 at 68,204-05, Petition App. 119a-120a). During the one-year "closed" period more than 43 trillion cubic feet of Order No. 451 gas flowed on WNG's system in packages as small as 1300 MMBtu per month. In addition several of the many buyers of that gas were small municipal LCDs like the Cities. The Cities' gas consultant advised them in March, 1988, that he and another supplier could put together "an excellent 451 package." (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,205, Petition App. 120a). Indeed, those two suppliers actually bought Order No. 451 gas and resold it to other customers on WNG's pipeline system in May, June, and July, 1988. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,205, Petition App. 120a).

Notwithstanding this opportunity to obtain gas from third parties and have WNG transport the gas to them at a total delivered price lower than WNG's sales rates, the Cities did not respond to any of the Order No. 451 offers, including their own consultant's. Instead, as the minutes from two Auburn City Council meetings reflect, the Cities as a group made a conscious decision not to purchase Order No. 451 gas because doing so "might be detrimental to our law suite [sic]." (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,205, Petition App. 121a).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN DECISIONS OF THIS COURT OR THE OTHER COURTS OF APPEALS AND THE TENTH CIRCUIT'S AFFIRMATION OF SUMMARY JUDGMENT AGAINST THE CITIES' SHERMAN ACT § 2 CLAIM UNDER THE "ESSENTIAL FACILITIES" DOCTRINE

The Cities attempt to revive their claim for monopolization in violation of Sherman Act § 2 under the "essential facilities" doctrine by arguing that the court of appeals' decision conflicts with two decisions of this Court and one court of appeals decision: *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 472 U.S. 585 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); and *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). There is no conflict, however, between those cases and the lower court decisions in this case, for the Cities' essential facilities claims is fatally defective for several reasons.

The largest flaw in the Cities' argument is their failure to recognize a fundamental distinction between this case and *Aspen*, *Otter Tail*, and *MCI*. In each of those cases the defendant's conduct completely excluded the plaintiff from the market in which they competed. In *Aspen* the foreclosed market was the market for multi-mountain ski tickets; in *Otter Tail* it was retail electric power; and in *MCI* it was long-distance telephone service. Here, however, the competition the Cities claim existed between them and WNG (but which WNG has always disputed) was in the market for retail sales of natural gas, a market which was absolutely unaffected during the one-year "closed" period because the Cities served their retail customers without any interruption whatsoever.[9] As the Cities

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[9] The Cities state for the first time, albeit in only one conclusory sentence, that they compete with WNG for the *purchase* of natural gas. WNG questions whether "the purchase of natural gas" does, or even could, constitute a distinct market, but in any event the

themselves note, if anyone was excluded from a market by WNG's actions, it was wholesalers of gas, not retail distributors. (Petition at 16). Thus, because the three cases on which the Cities rely are inapposite to the present case, they are not in conflict with the court of appeals' decision.

Just as importantly, the Cities cannot satisfy the required elements of their claim. This Court has not discussed the essential facilities doctrine since the decision in *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912).[10] Over the years since that decision, however, the lower courts have developed four elements for the claim, which are accurately stated in the Cities' petition. (Petition at 14). WNG was entitled to summary judgment because the Cities did not present sufficient evidence on two of those elements: whether WNG denied them access to the facility (*i.e.*, the pipeline), and whether they could duplicate the pipeline, at least in an economic sense, by availing themselves of the abundant supplies of Order No. 451 gas during the one year "closed" period.[11]

Cities never raised that issue below and presented absolutely no evidence of any such supposed market. As a result, this Court should not consider it here, for the Cities' failure to present evidence of this late-claimed market cannot negate WNG's entitlement to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-22 (1986).

[10] The Cities characterize this Court's decisions in *Aspen* and *Otter Tail* as "leading essential facilities cases," but in fact the Court did not discuss the doctrine in either of those cases, and instead conducted traditional monopoly analyses in both.

[11] Curiously, the Cities raise only the first of these two elements in their petition, even though the district court granted, and the court of appeals affirmed, summary judgment for WNG on the absence of both elements. (*See* 955 F.2d at 648-49, Petition App. 8a-9a). That fact alone counsels against granting certiorari, since even if the Cities prevail on the first element, they still cannot succeed on their essential facilities claim because of their failure to present the second ground for summary judgment to this Court, thereby making the court of appeals' decision final and unassailable.

The Cities contend that they were entirely denied access to WNG's "essential facility" because they did not have access to the supplier of their choice. But that simply is not the law. When the law of essential facilities was first stated in the *Terminal R.R.* case, this Court held that the law only requires the putative monopolist to provide access on reasonable terms and conditions. 224 U.S. at 411. The Cities do not dispute that WNG continued to supply all the gas the Cities required to operate their distribution systems throughout the suspension of open-access. (*See* 955 F.2d at 648, Petition App. 7a). Since the rates and terms of WNG's sales service are regulated and approved by the FERC, they are conclusively presumed to be "just and reasonable." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co., Inc.*, 341 U.S. 246 (1951). Therefore, by providing access to the pipeline by way of its own sales service, WNG provided the Cities with just and resonable access to WNG's alleged "essential facility" and could not be liable for the antitrust violation claimed.

The Cities rely primarily on *Otter Tail*, arguing that the Court found a violation of § 2 on the independent basis of Otter Tail's refusal to "wheel" electricity (the electrical equivalent to gas transportation) to municipal electric companies within its territory. But that argument grossly misrepresents the facts and the holding in *Otter Tail*. There the private utility had refused to wheel *or* to sell wholesale power, thus leaving the municipal utilities with no source of electrical power unless they generated it themselves.[12] The Court held that Otter Tail violated the statute by its "refusals to sell at wholesale *or* to wheel. . . ." 410 U.S. at 378 (emphasis added). Thus, it was

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[12] The Cities blatantly misstate the facts of *Otter Tail* when they contend "WNG's offer of its own gas, when its customers wanted access to the pipeline, was equivalent to Otter Tail Power Company's *offer to sell its own electricity*. . . ." (Petition at 16, emphasis added). The true facts are clear from this Court's opinion: "Otter Tail *refused to sell* the new systems energy at wholesale and refused to agree to wheel power from other suppliers of wholesale energy." 410 U.S. at 371 (emphasis added).

Otter Tail's complete refusal to deal with the municipal utilities which constituted the violation, not (as here) simply a temporary one-year unavailability of precisely the service the Cities desired.

The holding of *Otter Tail* is entirely consistent with the purpose behind the doctrine of allowing competition to occur when one competitor enjoys exclusive control over access either to the product its competitors need to compete *e.g.*, *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310 (10th Cir. 1985), or access to the customers themselves. *E.g.*, *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985). If Otter Tail had supplied the municipalities with wholesale electric power, they would have been able to provide electric service to their customers. The same is true in this case: by supplying gas to the Cities via its regulated sales service, WNG allowed the Cities to obtain the product they needed to service their customers, *i.e.*, they had access to the facility. It is clear, then, that the Cities were not denied the ability to compete and their real complaint is only that they could have earned more profit if they had been able to obtain cheaper supplies. Therefore, since the Cities had access to WNG's sales gas, they had access to the pipeline and can prove no violation of the essential facilities doctrine.

Even if providing WNG's sales service cannot be considered reasonable access to WNG's pipeline, both lower courts also found in the alternative that the availability of large volumes of gas released under FERC Order No. 451, which FERC regulations required WNG to transport even during the "closed" period, constituted reasonable access to the pipeline. The Cities largely ignore this holding, thereby providing another reason for this Court to deny certiorari. (*See* footnote 11, *supra*). Even so, the existence and availability of Order No. 451 gas provide ample reason for the Court to deny the writ on the merits. The Cities' sole argument against this proposition is that the Order No. 451 gas was "only offered on a 'take it or leave it' basis, in packages too large for Cities to accept."

(Petition at 16 n.7). But the undisputed facts borne out by the evidence presented below simply do not support that statement. See pages 7-8, 12, *supra*.

The district court found, and the court of appeals affirmed, that the undisputed evidence of the availability of transportation for Order No. 451 gas to the Cities throughout the "closed" period conclusively shows that the Cities cannot prove they were denied access to WNG's system, even for the transportation of third-party gas. Far from being inconsistent with *Otter Tail*, that holding is fully in line with the *Otter Tail* result. In *Otter Tail*, the putative monopolist refused to provide either wholesale sales service or transportation of power generated by third parties. Here, WNG did both, thereby justifying a different result than in *Otter Tail*. Hence, the Cities present no reason for granting their petition based on some supposed inconsistency with *Otter Tail*.

Similarly, the decisions below are not inconsistent with either *Aspen* or *MCI*, and it is difficult to determine precisely what conflict the Cities attempt to show in their petition between those cases and this one. Apparently, the conflict the Cities perceive with *MCI* is that the Seventh Circuit found that federal regulation did not exempt AT&T's conduct from the antitrust laws. But clearly there is no conflict on that ground, for the lower courts in this case did not find WNG's conduct immune or exempt from the antitrust laws. Moreover, in the *MCI* case (as in *Otter Tail*) the defendant had denied all access by preventing any interconnection by MCI with local interchange carriers. 708 F.2d at 1132-33. As noted above, WNG did not preclude the Cities from any market.

The Cities' point with regard to *Aspen* is even more obscure. The Cities seem to argue this Court held in *Aspen* that the failure to provide precisely the access the plaintiff wants constitutes a denial of access to an essential facility. That argument does not present a conflict for this Court's resolution for the obvious reason that there is no such holding in *Aspen*. In fact, the Court did not even consider the essential facilities doctrine in *Aspen*.

Rather, the fact that the defendant had offered to allow the plaintiff to participate in the multi-mountain ski pass only on condition that it accept a substantially reduced share of revenue was but one of a host of actions the Court considered in determining that a jury's verdict finding the defendant's conduct lacked a business justification was supported by sufficient evidence. *Aspen*, 472 U.S. at 605-611. Nothing in the Court's opinion indicates that that fact, if it stood alone, would be sufficient to establish an essential facilities-based violation of § 2.

At bottom, though the Cities have characterized their reason for granting the writ as some supposed conflict between the decisions below and the decisions in *Otter Tail*, *Aspen*, and *MCI*, it is clear that no such conflict exists. The conduct condemned in those cases was far different than in the present case—in each the defendant had completely excluded the plaintiff from the market in which they competed. Here, even if there is competition for gas sales between WNG and the Cities, WNG did not exclude the Cities from that market. Thus, not only is there no conflict with the cases the Cities cite, there is no violation of the "essential facilities" doctrine whatsoever, and the courts below were correct in granting and affirming summary judgment against the Cities' claim.

II. CERTIORARI ON THE CITIES' "TYING" CLAIM SHOULD BE DENIED BECAUSE THEY FAILED TO DEMONSTRATE A DISPUTED ISSUE OF FACT ON THE ABSENCE OF A REQUIRED ELEMENT OF A TYING VIOLATION OF SHERMAN ACT § 1

WNG acknowledges that the concerted action requirement of § 1 in a claim for illegal tying can be found in an agreement between the plaintiff and defendant. Neither party raised that issue on summary judgment; instead, the district judge reached the holding that no concerted action was present here *sua sponte*, and the court of appeals simply affirmed it. Moreover, whether or not there was concerted action in this case, the Cities still cannot

succeed on their tying claim because of the alternative ground for summary judgment found by the district court and endorsed by Judge Seymour's concurring opinion for the Tenth Circuit—the Cities were not *forced* to purchase WNG's sales gas. (*See* 955 F.2d 658-59, Petition App. at 30a-32a (Seymour, J., concurring)).

The gist of the Cities' tying claim was that WNG had tied its transportation service to its sales gas, thus forcing customers to accept WNG's own sales gas to obtain transportation service. The undisputed evidence below, however, demonstrates that WNG was not only willing to provide transportation without its sales service, WNG was compelled to do so by FERC Order No. 451, and, in fact, did so during the "closed" period. 18 C.F.R. § 284.201. This Court made clear in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), that no violation of § 1 occurs in the absence of a forced purchase of a second product.

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product *to force the buyer into the purchase of a tied product* that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.
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> * * * *
>
> *When "forcing" occurs*, our cases have found the tying arrangement to be unlawful.

466 U.S. at 12, 14 (emphasis added). That element is not satisfied here because of the availability of FERC Order No. 451 gas.

WNG has already demonstrated at length the availability of Order No. 451 gas as an alternative to WNG's gas sales. The district court clearly found that the lack of forcing warranted summary judgment for WNG, and it was on this basis that Judge Seymour would have affirmed the district court holding. (*See* 955 F.2d at 659, Petition App. at 32a). The Cities virtually ignore this

independent basis for affirming the district court, relegating the whole issue to a footnote in which they say that the district court's holding and Judge Seymour's concurring opinion are "not dispositive" because "WNG had monopoly power." (Petition at 20 n.14). Clearly, however, whether WNG possessed monopoly power is irrelevant if, in fact, WNG did not require the purchase of two products together. Here, WNG did not—transportation service alone was available for the transportation of Order No. 451 gas which the Cities deliberately avoided. Therefore, the Cities cannot prove that WNG forced the Cities to purchase its sales gas, and their tying claim must fail. For that reason alone, the Court should deny the Cities' petition for certiorari to review the court of appeals' affirmance of summary judgment against the Cities' tying claim.

III. THE ONLY EVIDENCE IN THE RECORD IS THAT WNG'S ACTIONS WERE JUSTIFIED BY LEGITIMATE BUSINESS REASONS WARRANTING SUMMARY JUDGMENT FOR WNG, THUS ELIMINATING ANY GROUND FOR THIS COURT'S REVIEW

The Cities' final proposition, that the court of appeals erred in affirming summary judgment against their "general monopolization" claim, is really directed at three issues: (1) whether WNG's conduct was motivated by legitimate business justifications, (2) whether some of the Cities lack standing to assert all or part of their claims, and (3) whether the Cities had failed to present evidence of an effect on competition. As Judge Seymour noted in concurring, the last two of these are irrelevant and need not be addressed at all since the district court was correct in ruling in WNG's favor on the first. Even so, the Cities cannot prevail on any of the three issues.

A. There Were Legitimate Business Reasons for WNG's Actions

The district court found that, in the context of the regulatory turmoil then extant in the natural gas industry, WNG's suspension of open-access was justified by the legitimate business purpose of avoiding exposure to mil-

lions of dollars, in take-or-pay exposure which was likely to occur if the interim program had continued. (*See* 743 F. Supp. at 1454, Petition App. 66a-68a). The Cities contend that WNG was motivated by a desire to prevent transportation because its profits were higher for sales than for transportation, and that WNG wanted to coerce favorable contracts from its customers by refusing transportation until they agreed to new contracts. The Cities describe these factors in combination as the "intent to use [WNG's] monopoly power to exclude competitors so it could limit its losses and make more profitable sales." (Petition at 21). That argument is faulty as a matter of law.

First, contrary to the Cities' assertion, WNG's profitability was not dependent on its making sales. The undisputed evidence in the district court shows that, since the mid-1970s, federal regulation of WNG and other pipelines has precluded pipelines from charging a "mark-up" or profit margin on the gas cost component of gas sales, and instead requires those costs to be passed through dollar-for-dollar. 18 C.F.R. § 154.302(j). *Cf. State of Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990). Any "profit" is provided to WNG in the form of a regulated return on its rate base, *i.e.* its investment in facilities to provide service. But the required facilities on which the return is calculated is the same whether the gas moving on the system is transportation gas or sales gas. Thus, whether WNG provides firm transportation or sales, its regulated "profit" is the same, and the Cities presented no contrary evidence.

Similarly, there is insufficient evidence in the record to overturn summary judgment against the Cities' claim that WNG was motivated by a desire to extract new contracts from the Cities with onerous terms. Every WNG official to testify on the issue stated unequivocally that but for the take-or-pay exposure WNG would face by continuing the interim program, open-access never would have been suspended. In contrast, the only evidence the Cities presented consisted of affidavits of a couple of city

officials stating their impression that they felt coerced into signing new contracts. The uncontradicted evidence, however, is that WNG never asked or required the Cities to execute new sales service agreements. Indeed, just the opposite was true. On a number of occasions WNG informed the Cities that under the permanent open-access program they could have whatever service they desired.[13] Therefore, any contention that WNG was motivated by a desire to foist burdensome contracts on the Cities is wholly without any basis in the record, leaving take-or-pay exposure as the only relevant business justification.[14]

Focusing only on the motivation to avoid take-or-pay exposure, the Cities attempt to portray that as a pure profit motivation. (Petition at 22, ". . . just another way of saying WNG wanted to use its monopoly power to reduce its losses or make more profits"). This they say is "the promotion of self interest alone" which they equate to the justification rejected in *Otter Tail*. *Id.* But clearly it is much more than that. In *Otter Tail*, the defendant was concerned only with making sales instead of the plaintiff. Here, WNG was unconcerned whether it made the sale directly or whether the Cities made the sale using gas transported on WNG's system—either way WNG's profits are the same. Instead, WNG's clear motivation

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[13] The Cities presented an identical "coercion" argument to the FERC, which was rejected. *Williams Natural Gas Co.*, 44 F.E.R.C. (CCH) ¶ 61,009 (1988). The finding of no coercion was not appealed, thereby precluding the Cities from further asserting the claim here. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336-37 (1958).

[14] The court of appeals did "state" that WNG earned more profit on sales than transportation, and that WNG wanted to, and did, execute new sales service contracts with the Cities, but the district court found neither. (*See* 955 F.2d 647-48, 655, Petition App. at 6a, 22a). Both of those court of appeals' statements are simply not supported in the record, and the Cities do not even attempt to claim they executed new sales service agreements. Those errors, however, inured to the benefit of the Cities under their theory since they argue it makes WNG's conduct more egregious. When the actual facts about WNG's motivations are brought out, the Cities' arguments are even less worthy of consideration.

was to avoid millions of dollars in contract liabilities to third parties.

This Court has stated that "a company which possesses monopoly power and which refuses to . . . deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal." *Aspen*, 472 U.S. at 597. "No matter how essential a monopolist's resources might be, he is never obligated to sacrifice legitimate business objectives." P. Areeda, H. Hovenkamp, *Antitrust Law* ¶ 736.2f (1991 Supp.). In the Statement of the Case above, WNG outlined the complex and ever-changing regulatory environment with which it has had to contend for the past several years, including the ever-present take-or-pay "sword poised next to [WNG's] corporate throat." *State of Illinois v. Panhandle Eastern Pipeline Co.*, 603 F. Supp. 786, 790 (C.D. Ill. 1985) ("*Panhandle I*"). Nevertheless, despite facing what the *Panhandle* court later described as a "business equation [which] takes on all the appearances of a classic type A heart attack producer for those called upon to make the corporate decisions," *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826, 918 (C.D. Ill. 1990) ("*Panhandle II*"), WNG forged ahead in the difficult process of becoming an open-access transporter under a rational and comprehensive plan.

While waiting for approval of that plan, WNG also initiated an interim open-access program under the self-implementing transportation provisions of NGPA § 311. During the interim program, WNG's take-or-pay exposure continued to mount, though WNG was able to maintain the program during June and July of 1987 by obtaining temporary take-or-pay waivers from its principal supplier. Finally, on August 1, 1987, when additional take-or-pay waivers were no longer available, WNG suspended the interim transportation program until FERC approved the RS&A and its provisions enabling WNG to responsibly manage take-or-pay obligations. FERC finally approved the permanent open-access plan under an NGA § 7 certificate on July 5, 1988, and the open-access tariff

on July 19, 1988. WNG began open-access operations the very next day on FERC-approved terms.

Under no stretch of the language could this conduct be described as "willful maintenance of monopoly power." On the contrary, WNG's actions were always directed toward relinquishing whatever market power in sales of natural gas it might have had by allowing competitors to use its system to do business with WNG's historical sales customers—a decidedly pro-competitive act. *See Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). As Professor Areeda has observed, "One surely cannot monopolize a market by withdrawing from it." P. Areeda, H. Hovenkamp, *Antitrust Law* ¶ 736.1g (1991 Supp.). WNG was not obliged to commit corporate suicide in the meantime merely because the Cities (eight of the hundreds of communities served by WNG's system and the numerous parties participating in the RS&A proceeding at the FERC) were dissatisfied with the speed of the regulatory process.

The Cities conspicuously avoid all reference in their petition to the series of decisions in the virtually parallel litigation between the State of Illinois and Panhandle Eastern Pipe Line Company, but much can be learned from those decisions, particularly the Seventh Circuit's affirmation of judgment for Panhandle. *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, —— U.S. —— (1992). In that decision, the court of appeals succinctly stated the principles which properly guided the lower courts here in their decisions:

> Monopolists needn't acquiesce to every demand placed upon them by competitors or customers; a monopolist's duties are negative—to refrain from anticompetitive conduct—rather than affirmative—to promote competition. Just as the monopolist has no duty to deter the sale of its own equipment by promoting that of a competitor, so too *it has no duty to incur contractual liability itself* by excusing its customers from their contractual obligations.

Id. at 1484 (citations omitted, emphasis added). The same is true here. The antitrust laws do not require WNG to rack up millions in take-or-pay contractual liability simply so the Cities can earn higher profits sooner by purchasing lower cost gas and reselling it to their captive customers.

To be sure, this case "tells the story of an industry in turmoil, with almost nobody happy about their situation at any given time," *Panhandle II*, 730 F. Supp. at 910, but that is insufficient to impose treble-damage antitrust liability on WNG when its actions were not only reasonable reactions to the ever-changing market and regulatory instability, but also directed to the long-term, procompetitive goal of permanent open-access on a reasonable basis. The court of appeals and the district court were entirely correct to find that WNG's actions were motivated by perfectly legitimate business reasons, and those decisions do not conflict with decisions of this or any other court. Hence review by this Court is not warranted and the Cities' petition should be denied.

B. Six of the Cities Lacked Standing to Bring Claims Under § 2 for Some or All of the "Closed" Period

Three of the Cities were obligated by contract to purchase their full requirements of natural gas from WNG throughout the entire period during which the interim open-access program was suspended, and three others were similarly obligated by contract for about three quarters of that time. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,196, Petition App. 95a-96a). All of these contracts were expressly approved by the FPC and the FERC and were incorporated into WNG's tariff, and each expressly incorporated the tariff into the contract. The district court held, as a matter of law, that as a result of these contracts, the Cities had suffered no legally cognizable injury from WNG's actions, and therefore had no standing to bring § 2 claims in this litigation. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,203, Petition App. 116a). The Tenth Circuit affirmed that holding, albeit on somewhat different grounds. (*See* 955 F.2d at 653, Petition App. 18a).

The Cities now claim that those holdings conflict with this Court's decision in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983), because they fail to "balance" a series of factors relating to standing identified in that decision. (Petition at 25). The Cities argument, however, greatly misperceives the holding in *Associated General Contractors*, and wholly misses the point of the standing question as WNG raised it on summary judgment.

Contrary to the Cities' assertion, *Associated General Contractors* did not identify a series of factors to be weighed in assessing standing, but rather identified several factors which might preclude a plaintiff from having standing even though it had suffered an injury connected to the unlawful conduct. *Id.* at 537 ("previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances"). In that case, the Court focused on "the nature of the plaintiff's alleged injury," and found it to be outside the scope of the antitrust law. *Id.* at 538-39.

The nature of the injury the Cities claim here is the inability to purchase gas from someone other than WNG, or stated otherwise, the inability to breach their full-requirements contracts with WNG and violate the full-requirements provision of WNG's FERC-approved sales tariff. Clearly that is not a legally cognizable injury at all. Long ago, this Court noted that the word "injured" as used in Clayton Act § 4 "implies violation of a legal right." *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922); *see also Maltz v. Sax*, 134 F.2d 2, 4 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943) (Plaintiff had no legal right to manufacture illegal gambling device, therefore it suffered no cognizable injury under Clayton Act § 4 by conspiracy to exclude it from that business).

In *Keogh*, the plaintiff complained of having to pay higher rail shipping rates as a result of the defendants' conspiracy. However, the rates had been approved by the

Interstate Commerce Commission ("ICC"), and the Court held that plaintiff's only legal right was to a rate properly established by the ICC. Therefore, plaintiff had not suffered any "injury" under § 4 by paying the ICC-set rate, notwithstanding the defendants' conspiracy. *Keogh*, 260 U.S. at 163-64. *See also Panhandle III*, 935 F.2d at 1485 ("Panhandle's G tariff customers, by contrast, were contractually obligated to purchase their gas requirements from Panhandle . . ."); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 694-95 (10th Cir. 1989), *cert. denied*, —— U.S. —— (1990) ("Natural did not use economic coercion in its attempt to monopolize. Rather, Natural took advantage of its contractual right"); *United States v. Pacific Gas & Elec. Co.*, 714 F. Supp. 1039, 1051 (N.D. Cal. 1989); *Admiral Theatre Corp. v. Paramount Film Dist. Corp.*, 140 F. Supp. 686, 698 (D. Neb. 1955).

The same principle applies here. The operation of WNG's rights under the full-requirements contracts, and the Cities' consequent temporary inability to obtain gas from third parties (except to the extent they could have purchased Order No. 451 gas), preclude the Cities from claiming antitrust injury in this case. While their contracts with WNG were in effect, the Cities had no legally protected interest in the purchase of gas from others. Rather, they were contractually obligated to purchase their entire requirements of gas from Order No. 451 gas sellers and/or from WNG. Without such a legal right to purchase third-party gas, the Cities have suffered no legally cognizable injury, antitrust or otherwise.

C. The Courts Below Properly Applied the Summary Judgment Standards Articulated by This Court In Assessing the Cities' Claims

In their final argument, the Cities contend that the lower courts failed to apply the proper standards for summary judgment to their claim of antitrust injury by failing to consider the evidence in the light most favorable to them. The only supposed facts they note that the lower courts supposedly failed to consider, however, is

that they presented evidence that WNG's price was higher than the price they paid during the interim program, and that they "explained" that they had to raise their own retail rates with the consequence of losing "customers, sales and profits." (Petition at 26). It is true that WNG's sales rate was higher than the price charged by the Cities' chosen alternative supplier during interim open-access, but that fact alone proves nothing. Areeda, Hovenkamp, *Antitrust Law* § 736.1g (1991 Supp.) ("it is generally assumed that an otherwise lawful monopolist does not violate the statute by charging a monopoly price").

Although the Cities have complained throughout this litigation that they will lose customers and sales because of WNG's actions, they have never presented any evidence of that, including in response to WNG's motions for summary judgment. Therefore, the courts below did not violate summary judgment standards by failing to consider that claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 320-21 (1986) (summary judgment required against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . .").

The Cities rely on this Court's recent decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, —— U.S. ——, 60 U.S.L.W. 4465 (1992), but their reliance is misplaced. The point of the Court's holding in *Kodak* is merely that decisions on summary judgment cannot be based on abstract economic theories without any evidentiary support in the record. Rather, summary judgment can be granted only after adequate time for discovery is permitted, and only when the actual evidence presented shows that there is no disputed issue of fact on a decisive issue and the movant is entitled to judgment as a matter of law. *Id.* at 4469-70.

The holding in *Kodak* does not represent a departure from this Court's prior decisions on summary judgment including *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,

475 U.S. 574 (1986). The district court followed the principles of those decisions in this case, noting that extensive discovery was taken by both sides over a more than one-year period. (Petition App. at 40a, 70a, 92a). Both parties submitted a large volume of documentary and testimonial evidence in support of and opposition to four separate summary judgment motions. (*See* 1990-91 Trade Cas. ¶ 68,967 at 63,195, Petition App. 92a). The district judge thoughtfully considered that evidence and based his decision solely on the evidence rather than economic theory. Thus, the district court decisions, and the court of appeals decision affirming them, are wholly consistent with *Kodak*, as well as *Celotex* and *Matsushita*, and no review in this Court is necessary.

IV. THE ISSUES RAISED IN THIS CASE ARE NOT SUFFICIENTLY IMPORTANT TO MERIT THIS COURT'S ATTENTION

The actions about which the Cities complain in this litigation arise out of an industry in transition. In essence, the Cities argue that WNG moved too slowly in making the transition to become a permanent transporter of natural gas, and that in the process WNG attempted to garner too much power unto itself. It is not disputed, however, that whether or not the Cities are right, the transition was completed long ago. (*See* Petition at 10, acknowledging preliminary injunction moot in 1988). WNG has been an open-access transporter for over four years. In fact, all major interstate pipelines are now open-access transporters, and most have been for several years. 1990 FERC Annual Report at p.4. The FERC initiatives instituting open-access have been completed, and the post-implementation adjustments to the regulations and the pipelines' operations programs have been made.[15] Even

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[15] The FERC did recently promulgate its Order No. 636, 57 Fed. Reg. 13,267 (1992), which further "unbundles" the gas sales, transportation, and storage services interstate pipelines continue to provide. Nevertheless, the conversion from merchant-only sales service to open-access transportation was complete years ago.

the FERC and the Court of Appeals for the District of Columbia Circuit have acknowledged that interstate pipelines no longer possess "market power over the marketing or sales of natural gas . . ." *Tenneco Gas v. FERC*, —— F.2d ——, Slip Op. at 22 (D.C. Cir. July 21, 1992).

In short, the conduct at the heart of this litigation was the result of historical and regulatory events which have now run their course and are not likely to be repeated. As far as WNG is aware, the only other antitrust action arising out of the pipeline industry's transition has been finally adjudicated and this Court has denied certiorari. *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, —— U.S. —— (1992). Further adjudication in this case will have no bearing on any other parties' conduct, and in a substantial number of cases the statute of limitations on any antitrust claim which might have been brought has expired. Clayton Act § 4B, 15 U.S.C. § 15b. Any decision by the Court in this case will affect only the Cities and WNG and will have no broader impact on the public at large, making this case inappropriate for review on certiorari. *See, e.g., NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502 (1951); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties . . ."). Therefore, the Cities' petition should be denied.

CONCLUSION

For all the foregoing reasons, WNG respectfully requests this Court to deny the Cities' petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

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Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF CHANUTE, KANSAS, *et al.*,
Petitioners,

v.

WILLIAMS NATURAL GAS COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

Respondent Williams Natural Gas Company's ("WNG") brief in opposition, despite its improper reliance on contested issues of fact, concedes basic matters which underscore the importance of this Court granting *certiorari* to correct fundamental errors of law committed by the circuit court below, which immunize the nation's interstate pipeline companies from antitrust liability. First, while conceding that nothing in the "regulatory regime of the Natural Gas Act . . . and the Natural Gas Policy Act of 1978 'immunizes' WNG from the antitrust laws," (WNG Br. at 2) and not contesting the court's finding that it had monopoly power in the relevant market under § 2 of the Sherman Act through control of its interstate transmission facilities (App. 21a), WNG inconsistently argues that the circuit court properly affirmed, as a matter of law, that such an interstate pipeline can refuse to transport through its facility gas purchased by distributors in competition with it from independent producer sources at low market prices, as long as the pipeline agrees to sell its own gas at FERC regulated prices. WNG Br. at 15. But this is in essence a thinly veiled regulatory immunity argument, uniformly rejected by this Court and other courts.

WNG's further contention that the antitrust laws do not apply because of its transmission of gas from certain other restricted sellers at above market prices is equally wrong. WNG Br. at 16-17. By including these other sellers (under FERC Order No. 451, 51 Fed. Reg. 22,168 (1986) ("Order 451"), WNG in effect concedes that the court's logic below was not premised on WNG's sales of its own gas at FERC regulated prices, but on the idea that immunity exists simply where WNG sells or transmits any gas at any price. If a monopolist can use its essential facility to force the purchase of its own or other similarly high priced gas and thereby obtain immunity from § 2 of the Sherman Act to enable it to bar access by distributors in competition with it to available low priced supplies of gas, the antitrust laws will have become meaningless. Thus, the circuit court decision below should be reviewed because of its adverse

impact on the applicability of § 2 of the Sherman Act in the increasingly important realm of competitive dealings between producers and purchasers of natural gas vitally dependent on transmission by interstate pipelines at the national level.

Secondly, WNG concedes that the court of appeals erred in holding that a § 1 claim under the Sherman Act for illegal tying cannot be found in the arrangements and contracts between the Cities and WNG. WNG Br. at 18. This admittedly defective key ruling by the Tenth Circuit below is important because it would exempt virtually all tying arrangements between an interstate pipeline and its distributors or other customers, treating such agreements as "unilateral conduct" outside the scope of Sherman Act § 1. WNG's attempt to revive the court's holding by reliance on the concurring opinion of one of the judges (who disagreed with the majority on this issue) is legally defective, because the majority did not accept or expressly agree with the suggested alternative. App. 13a. Furthermore, the alternative, i.e., that the existence of Order 451 gas precluded any claim that WNG "forced" the Cities, by closing its pipeline, to purchase WNG's gas, is factually and legally defective. Not only was the first Order 451 gas available months after WNG had closed its pipeline and forced the Cities' new arrangements with it (App. 6a), but also WNG's conduct in closing the pipeline forced the subsequent availability of that Order 451 gas to be priced at a high level closely approximating WNG's own price, so that the Cities were still forced into an unacceptable, anticompetitive, high priced "alternative" which provided them no effective relief in their ability to compete with Williams in the relevant market.

Third, WNG's urging that the court of appeals properly held that WNG's conduct, as a matter of law, was motivated by legitimate business justification, directly conflicts with WNG's concession that it had no "full requirements" contract with at least five of the Cities before or during all of the closed period. WNG Br. at 25. This requires setting aside the summary judgment against all eight Cit-

ies. The majority opinion expressly ruled that its grant of summary judgment against all the Cities, based on its ruling of law that WNG had a "legitimate business justification," was premised solely on the court's conception that the Cities had full requirements contracts with WNG. App. 24a. The majority itself expressly conceded that without the existence of such contracts, a point now conceded by WNG in its brief, this Court's opinion in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) would control and summary judgment should be denied. App. 24a. Furthermore, the majority of the court below also cited *State of Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, ___ U.S. ___ (1992), a case relied upon by WNG, as similarly holding that a valid business justification can exist only where full requirements contracts are in place between the pipeline and its customers while it closed its pipeline. App. 24a.

In sum, the circuit court's decision effectively denies access to federal courts for antitrust claims on three major antitrust premises, i.e., monopoly control under § 2 relating to essential facilities, tying agreements under § 1, and rulings of law as to legitimate business justifications. These are significant to producers, pipelines and consumers and go to the heart of the proper administration of the federal antitrust laws, this Court's decisions and sound public policy. The Tenth Circuit decision, involving sweeping, wide-ranging changes in the existing application of the federal antitrust laws to this important area involving approximately 30 percent of the nation's energy supply, should be reviewed.

1. WNG's response to the Cities' analysis that the court of appeals had improperly negated § 2 of the Sherman Act and the essential facilities doctrine by the unique ruling that the owner of such a facility can bar its use for transmission of alternate lower cost competitive supplies of gas by simply offering to sell its own gas, regardless of price, is patently fallacious. WNG alleges "a fundamental distinction" between this case and *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984),

aff'd, 472 U.S. 585 (1986), *Otter Tail*, and *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) on the ground that in each of these cases the defendant's conduct completely excluded the plaintiff from the market in which they competed. WNG. Br. at 13-14. This is a plain misreading of the cases. In *Aspen*, the defendant did not completely exclude the defendant from participating in a multi-mountain arrangement for ski tickets, but set the pro rata share allocated to the plaintiff so low as to impair the economic viability of the proposal to the plaintiff. *Aspen Skiing*, 472 U.S. at 590-92, 608-09. In *Otter Tail*, the defendant refused to wheel a lower cost wholesale supply of power to the plaintiff cities, while it did offer to sell its own power at retail under regulated prices to serve customers in each of the cities. *Id.*, 410 at 368. The Tenth Circuit's decision conflicts with *Otter Tail* because that case firmly holds that the existence of regulated services does not, standing alone, provide reasonable access sufficient to justify the company's refusal to transmit power over its lines.[1]

Similarly, in *MCI*, the Seventh Circuit directly overruled the defendant's contention that since its connection services were regulated, the defendant's refusal to give plaintiffs access to alternate long distance services could not constitute a violation of the essential facilities doctrine. *MCI*, 708 F.2d at 1101-1105. In each of these cases, the defendant denied access to essential facilities owned and controlled by it for transporting or making available

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[1] WNG alleges that *Otter Tail* is not an "essential facilities case." WNG Br. at 14 n.10. While it is true that the term "essential facilities" was not used, commentators and courts alike have described *Otter Tail* as an essential facilities case. *See*, e.g. Areeda & Hovenkamp, *Antitrust Law*, ¶ 736.1 (Supp. 1989) at pp. 699, 708; Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). By the same token, while this court in *Aspen* discussed the issue using principles and language of Section 2 of the Sherman Act, the court's analysis covered all of the substance of the antitrust issues which this Court and the circuit courts have focused on in describing the "essential facilities doctrine."

plaintiff's own product, thereby requiring the plaintiff to use the defendant's product. This is identical to WNG's denial of use of its transmission system for the Cities own gas, thus forcing the use of WNG's gas.[2]

Furthermore, the concept espoused by WNG, that the antitrust laws only apply to conduct which completely excludes the plaintiff from the market, wrongfully characterizes established antitrust law holding that a refusal to deal, except on unreasonable terms, includes conduct short of total exclusion. *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179-180 (2d Cir. 1990), *Consol. Gas of Fla. v. City Gas Co.*, 665 F. Supp. 1493, 1534-35 (S.D. Fla. 1987), *aff'd en banc*, 912 F.2d 1262 (11th Cir. 1990). Accordingly, the court of appeals erred in deciding that "[a]s a matter of law, we find Williams' supply of gas at FERC approved prices provided the Cities with reasonable access to the pipelines." App. 9a.

WNG's alternate contention, that the Cities' essential facilities claim fails because of the availability of Order 451 gas from WNG, is legally and factually defective. WNG's offer of Order 451 gas is indistinguishable from WNG offering its own gas. In both cases, the gas being offered to the Cities by WNG expressly excluded the Cities' ability to receive transmission of their own purchased gas supply which had been negotiated independently under competitive conditions from alternative gas suppliers. Loss of Cities' OWN gas supply directly impaired the Cities' ability to compete with WNG. The established facts of record, not challenged by the Tenth Circuit in its opinion, had been set forth earlier by the district court in granting a preliminary injunction to the Cities, namely, that because

[2] WNG argues that the Cities competed with WNG for retail customers and, because Cities were able to serve their retail customers (albeit not by using their own gas but by being forced to buy WNG's gas), no violation occurred. Under this theory, had the Cities in *Otter Tail* been forced to allow the defendant to serve the retail customers in the Cities, there would have been no antitrust violation from the defendant's refusal to deal. Such a proposition is clearly inconsistent with the rationale and holding of *Otter Tail*.

of the lack of competition resulting from WNG's closing the pipeline, the Order 451 gas was priced only a few cents lower than WNG's own price, and that regardless of price, the Order 451 supply was interruptible, in large blocks, and did not meet the Cities' smaller firm gas requirements. App. 6a, App. 146a.[3] Furthermore, Order 451 by its terms was not applicable to those Cities whose existing gas purchase contracts with WNG had expired.[4] WNG rightfully concedes that the FERC's regulations dealing with Order 451 gas provided only WNG's "firm sales customers" with a right of first refusal to purchase gas. WNG Br. at 12. This fact alone bars the court's summary judgment against all of the Cities based on Order 451. But regardless of this, WNG's offering of 451 gas at an admitted price substantially in excess of the price that the Cities obtained in their contracts with outside third party gas sellers, directly impaired the Cities' ability to compete with WNG in the market. *See* App. 145a-146a. Thus, WNG's refusal to transport the Cities' gas denied them access on reasonable terms and conditions to the essential facilities. *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912).

But no matter how the ruling is characterized, its breadth and importance cannot be doubted. By holding as a matter of law that a pipeline having monopoly power through its control of an essential facility can close its line to transportation of competitive supplies purchased and

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[3] As the circuit court below confirmed (App. 6a):

> The approved third party suppliers' gas that Williams continued to transport was short term and interruptible,[6] whereas the other third party suppliers provided long term, firm and much cheaper gas.[7] *Id.* at 1521.

[6] Interruptible service does not guarantee that a producer will have sufficient supplies of natural gas to meet all consumers' demands.

[7] Firm service does guarantee that consumers' demands will be met.

[4] *See* FERC Regulations, 18 C.F.R. § 270.201(g)(1)(ii).

owned by distributors in competition with the pipeline, by the simple expedient of offering only its own gas or similar higher-priced gas (*see* App. 6a), poses a widespread national issue, an issue important to the day-to-day business dealings between interstate pipelines and those selling or purchasing gas dependent on transmission through the pipeline's facilities.

2. WNG does not even attempt to defend the majority opinion on the tying issue. WNG Br. at 18. The court's holding, that a contract between a buyer and a seller is not a tying contract in violation of § 1 because it lacks the required multiplicity of parties, conflicts with decisions as old as *International Salt Co. v. United States*, 332 U.S. 392 (1947), and as recent as *Eastman Kodak Company v. Image Technical Services, Inc.*, ___ U.S. ___, 60 U.S.L.W. 4465 (1992) and numerous decisions in the interim. Petition at 17-20. This Court should not allow such a bad precedent to remain uncorrected.

WNG's attempt to salvage this issue by asserting that the majority's summary judgment can be upheld on the alternate ground that the Cities were not *forced* to purchase WNG's sales gas because of the availability of Order No. 451 gas, is both legally and factually deficient. First, WNG's claim is legally defective because the majority opinion denied the Cities' tying claim under § 1 of the Sherman Act solely on the ground "that a tying arrangement imposed by a single entity is not proscribed by § 1 of the Sherman Act." App. 12a. The majority never decided the Cities' claim of error regarding "forcing" of a tying arrangement, deeming that to be a moot question in view of its decision on the single entity issue. App. 13a at fn. 11. Not having decided the forcing issue, it was impermissible speculation on behalf of the concurring judge to so conclude. App. 30a-32a. Furthermore, the concurring judge was in error on the record. When WNG closed down its pipeline on August 1, 1987, there were no available supplies of Order 451 gas for a number of months and all of the Cities were forced to take WNG's gas in the interim. Thereafter, Order 451 gas was available only to pipeline

customers with existing firm requirements contracts. WNG Br. at 12, II FERC Regulations (CCH) ¶ 24,051 at 14,115, 18 C.F.R. ¶ 270.201(g)(1)(ii) (1987). Thus, the five Cities with the expired contracts had no "right" to "force" WNG to transport Order 451 gas for all or part of the year the pipeline was closed.

3. WNG's contention that "the only evidence in the record is that WNG's actions were justified by legitimate business reasons warranting summary judgment for WNG" flagrantly misstates substantial contrary evidence confirmed by the court of appeals below. *See* App. 6a-7a, 19a-21a. The court concluded that Cities had established "Williams has monopoly power in the relevant market" (App. 21a); that the Cities' evidence showed WNG was confronted only by a modest $12.1 million take-or-pay exposure (App. 20a); and that WNG in fact had closed its pipeline to enhance its higher profits from sales (App. 20a).[5] But the Court went on to hold as a matter of law that because "Williams . . . wanted to prevent conversion of sales service to transportation service" Williams' refusal to provide access was justified by "Williams' legitimate business concerns."

> . . . The Cities argue Williams' low take-or-pay liability cannot be characterized as a legitimate business concern sufficient to justify closing the pipeline. Perhaps that argument would fly if that were the only evidence of concern, but evidence exists Williams also wanted to prevent conversion of sales service to transportation service. Consequently, we hold refusal to provide access can be justified by Williams' legitimate business concerns. . . .

App. 23a. The lynch pin of the court's holding on the intent issue was its finding that WNG had existing full

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[5] WNG improperly tries to argue that it made no more profit on sales than transportation (WNG Br. at 22), a proposition refuted by its Annual Report to Stockholders. App. 20a.

requirements contracts with all of the Cities in place which justified it making the business decision to close the line.

> The Cities rely on *Otter Tail Power Co. v. United States*, 410 U.S. 366 . . . for the proposition an asserted business justification must be procompetitive to withstand judicial scrutiny. In *Otter Tail*, an electricity producer's refusal to transport electricity over its lines (wheeling) to towns with which its contracts had ended violated § 2 of the Sherman Act. A similar argument was raised in *Panhandle*, *Panhandle*, 935 F.2d at 1485. However, the *Panhandle* court found the existence of extant contracts with its natural gas customers distinguished the cases. Similarly, as noted above, we found the full requirements provision of the contracts to be in full force when the pipeline was closed. . . .

App. 24a.

Thus, under the Tenth Circuit's own rationale, a valid business reason exists where prior full requirements contracts exist, otherwise a contrary result would be reached under *Otter Tail*. The fatal error made by the Tenth Circuit below was its assumption that WNG had full requirements contracts with all of the Cities. However, as WNG conceded in its brief, five of the eight Cities' prior full requirements contracts had expired either before or during the relevant time period. WNG Br. at 25. Accordingly, based on the very rationale that the circuit court below employed, it was impossible for the court to validly conclude as a matter of law that summary judgment could be granted based on asserted business justification as to those Cities with expired contracts. To the contrary, as the Tenth Circuit clearly conceded, *Otter Tail* controlled so that a utility's refusal to transport electricity over its line to towns "with which its contracts had ended violated § 2 of the Sherman Act."[6]

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[6] WNG's second argument, that it did not close its pipeline in order

Furthermore, the court of appeals below clearly erred as a matter of law in holding that even though the evidence by the Cities showed that WNG's shut down was motivated by the desire to increase its profits from sales and to force the Cities into remaining as sales customers of WNG, this constituted a valid "business reason" to exonerate it under § 2. App. 23a-24a. This flies in the face of all of the decisions from *Otter Tail*, *Aspen*, and *MCI*, condemning such a clear abuse of monopoly power by a monopolist to enhance its monopoly position not through business acumen, but through bald anticompetitive domination.[7]

CONCLUSION

For the foregoing reasons, Cities urge that their petition for a writ of certiorari be granted.

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to cause Cities to sign new long-term sales contracts, WNG Br. at 21-22, also relies on disputed factual issues. City officials submitted affidavits that WNG officials told them that WNG's purpose in closing the pipeline was to force WNG's customers, including Cities, to sign new long-term sales contracts with WNG. *See* App. 23a-24a.

[7] Contrary to the decision below, where the desire for higher profits is obtained from abuse of monopoly power, it is not and should not be a legitimate business justification. Delaware and Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir. 1990) ("a monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.")

WNG's argument that Cities are precluded from relying on the coercion in this case because Cities previously lost a coercion argument before FERC WNG Br. at 22 n.13, is a serious misrepresentation. None of the nine Kansas Cities that were allowed to intervene in that FERC case are parties in this antitrust case. *Williams Natural Gas Co.*, 44 F.E.R.C. ¶ 61,009 at 61,039 n.3 (1988).

Respectfully submitted,

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